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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1445.

THE COMMISSIONERS OF THE TAXING DISTRICT OF THE CITY OF BROWNSVILLE, TENNESSEE, PLAINTIFFS IN ERROR,

vs.

JOHN LOAGUE, ADMINISTRATOR OF R. D. BAKER, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED DECEMBER 1, 1888.

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1 *Transcript of the Record for the Supreme Court.*

Circuit Court of the United States, Western District of Tennessee.

JOHN LOAGUE, Adm'r of R. D. Baker, Deceased,
vs.
THE COMMISSIONERS OF THE TAXING DISTRICT OF BROWNSVILLE, TENNESSEE. } No. 2888.

2 *Petition. Filed Mar. 19th, 1886. Bell W. Etheridge, Clerk. W. B. Weisiger, D. C.*

Circuit Court of the United States, Western District of Tennessee

JOHN LOAGUE, Administrator of R. D. Baker, Dec'd,
vs.
THE COMMISSIONERS OF THE TAXING DISTRICT OF Brownsville—W. M. Scott, President; Joseph Sternberger, Treasurer, and John R. Head, Secretary and Financial Agent, of the Taxing District of Brownsville. } No. 2888.

The petition of John Loague, adm'r of R. D. Baker, dec'd, would respectfully show that his intestate was a citizen of Kentucky, and in his lifetime was the owner and holder for value of certain coupons representing interest on certain bonds issued by the city of Brownsville, upon which he in his lifetime obtained judgments in this honorable court, a detailed history of which petitioners will now give: The General Assembly of the State of Tennessee, on the 8th of February, 1870, passed an act entitled "An act to confer upon the town of Brownsville, in the county of Haywood, the authority
3 to issue corporate bonds in aid of railroads, and for other purposes."

The 2d section of said act is in these words:

"SEC. 2. Be it further enacted, That the corporate authorities of the city of Brownsville, in Haywood county, are hereby authorized to issue corporate bonds to the amount of two hundred thousand dollars for said railroad purposes, to be called Brownsville railroad bonds, running not exceeding twenty years and bearing interest, payable annually, not exceeding the rate of interest where said bonds are made payable."

Section 5 of said act:

"SEC. 5. Be it further enacted, That the corporate authorities of the city of Brownsville shall levy annually an assessment upon all the taxable property within the limits of the corporation sufficient to pay the annual interest on the bonds that may be issued under the provisions of this act, and also to establish a sinking fund for the ultimate redemption of said bonds."

4 Petitioner has been informed that under this act the authorities of the said city of Brownsville issued 100 bonds for $500.00 each, bearing date July 1, 1870, and payable twenty years after date, at St. Louis, and bearing 8 per c't interest per annum from date, payable annually, represented by coupons attached to

each bond, for $40.00 each, payable July 1 of each year after the date of said bonds until their maturity. Petitioner would show that his intestate in his lifetime was the owner of sixty coupons detached from the bonds issued as aforesaid, having the following numbers, to wit, Nos. 71, 72, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 92, 96, 97, 98, 99, & 100, representing the interest on said bonds, due July 1, 1873, 1874, & 1875, upon which he obtained a judgment in this hon. court, March 1, 1876, for the sum of $2,628.00 and the cost of suit, against the mayor and aldermen of the city of Brownsville, in the case of R. D. Baker *vs.* The Mayor and Aldermen of the City of Brownsville, No. 2098, to which reference is made.

5 Petitioner would further show that his intestate, being the owner of twenty coupons detached from said bonds, for $40.00 each, representing the interest on said bonds due July 1, 1876, obtained a judgment on them in this hon. court, Dec. 20, 1876, for the sum of $822.50 and the costs of suit, against the mayor and aldermen of the city of Brownsville, in the case of R. D. Baker *vs.* The Mayor and Aldermen of the City of Brownsville, No. 2268, to which reference is made, and that his intestate also, being the owner of 20 coupons detached from said bonds, for $40.00 each, representing the interest due July 1, 1877, obtained a judgment in this hon. court, Dec. 21, 1877, for the sum of $822.66 and the costs of suit, against the mayor and aldermen of the city of Brownsville, in the case of R. D. Baker *vs.* The Mayor and Aldermen of the City of Brownsville, No. 2396, to which reference is made, and that his intestate also, being the owner of 20 other coupons, detached from said bonds, representing the interest due July 1, 1878, obtained a judgment

6 on same against the city of Brownsville in this hon. court, Dec'r 14, 1878, for the sum of $821.60 and the costs of suit, in the case of R. D. Baker *vs.* The Mayor and Aldermen of the City of Brownsville, No. 2543.

Petitioner would show that executions were issued on all of said judgments upon which *nulla bona* returns were made by the marshal, and thereupon in each case his intestate instituted proper proceedings to compel the mayor and aldermen of said city of Brownsville by mandamus to levy and collect a tax sufficient to satisfy said judgments and costs.

In the first of said cases, No. 2098 aforesaid, a peremptory mandamus was obtained in this hon. court March 30, 1877, in the case in this court of R. D. Baker *v.* Brownsville, No. 2203, which was duly served by the marshal upon the mayor and aldermen of said city, as will fully appear by reference to the records in said case, to which reference is here made.

7 Petitioner has been informed that said authorities levied a tax under said mandamus, but he has not been able to ascertain the amount of said assessment and levy, but he supposes that a portion of it was collected, as said judgment is credited July 30, 1877, with $500.00, and April 10, 1878, with $700.00.

Petitioner would show that no part of said judgment has been paid except the credits aforesaid. Petitioner would further show that by a like proceeding in the second judgment aforesaid in case

No. 2268 a peremptory writ of mandamus was obtained against the defendants on the 14th of February, 1877, which was served upon them, as will fully appear in record of said case, being No. 2299 in this hon. court, to which reference is here made.

Petitioner has been informed that there was an assessment and levy made in obedience to the command of said writ, but has been unable to ascertain the amount of said assessment and levy
8 and whether anything was ever collected thereon. No part of said judgment has ever been paid.

Petitioner would further show that his intestate, in this hon. court, also obtained, on the 10th of July, 1878, a peremptory mandamus against the defendants in the third case aforesaid, No. 2396, which was duly served upon the defendants, as will fully appear by reference to said mandamus proceedings, being No. 2463, to which reference is here made.

Petitioner does not know whether any levy was ever made under this writ or not.

On the last of said judgments there was never any mandamus proceeding sinstituted, so far as petitioner has been able to ascertain.

Petitioner would show that nothing has ever been paid on either said last-named judgments, and that all of said causes have been reviewed in this hon. court in his name.

Petitioner would show that the statements above made show the true condition of the case of his intestate on the 24th of February,
9 1879, at which time the General Assembly of Tennessee repealed the charter of the city of Brownsville. This repealing act in sec. 1 provides that "the board of mayor and aldermen of Brownsville or other corporate name, or *or* regulating municipal government thereof, be repealed, and all offices held under and by virtue of said acts be abolished: Provided, That this act shall not be so construed as to impair the obligation of existing contracts into which said corporation has heretofore entered." By sec. 1, ch. XCII, of the act of *the act of* Tennessee passed March 3 and approved March 14, 1879, which was enacted at the same term as the act repealing the charter of the city of Brownsville, it was provided that the Governor of the State shall appoint an officer for the extinct corporations whose charters have been repealed, to be known as a receiver and back-tax collector, whose duty it shall be to collect all back taxes of
10 such extinct municipality remaining uncollected at the repeal of its charter, &c. Petitioner would show that every effort has been made to induce both Governor- Hawkins and Bate to appoint some one who could give bond, &c., to said office, to no purpose, and no such officer has ever qualified. One was appointed, but he failed to give bond, and petitioner has been informed that the tax-payers in the city of Brownsville have actually petitioned the Governor not to appoint a receiver and back-tax collector.

Petitioner would show that it has been impossible for his intestate or any other creditor to receive any benefit intended to be secured by the appointment and qualification of a receiver and back-tax collector by the Governor, as authorized by act of March 14, 1879, aforesaid.

Petitioner would further show that the city of Brownsville, after the repeal of its charter, on the 24th of February, 1879, remained without a charter until after the passage of the act of April 1,
11 1881, under which the same people and territory have been again incorporated and organized into a municipal corporation, known as the taxing district of Brownsville. Said act is entitled An act to establish taxing districts of the second class, and to provide the means of local government therefor.

"Sec. 2 provides that the several towns or cities whose population does not exceed 30,000, and whose charters have been repealed or shall hereafter be repealed or abolished or in any manner become extinct, are hereby created taxing districts of the second class in order to provide the means of local government for the peace, safety, and general welfare of the people thereof."

"Sec. 3 provides that the governments of the several taxing districts of the second class shall be vested in a board of three commissioners for each district," &c.

SEC. 4. "That on petition of a majority of the voters within
12 the limits of any such town or city at the time of the repeal or surrender of its charter to the county court said court shall appoint the three commissioners for the government of said town or city to ascertain whether a majority of the voters have petitioned, — the number of voters cast at the last municipal election shall be taken as the number of legal voters within the territory.

SECTION 5. "That said commissioners shall elect one of their number president, another treasurer, and the other secretary and financial agent."

SECTION 6. "Said commissioners shall appoint such other officers and agents as may be necessary to execute the powers conferred by this act."

SEC. 8. "That said commissioners shall have power also over all other offices in their district in which the peace, safety and general welfare of the inhabitants are interested."

SEC. 9. "That said commissioners may enact all by-laws and ordinances necessary to carry into effect the object of their ap-
13 pointment not inconsistent with the general law; but said commissioners shall have no power to create a debt or to issue script, bonds, or other evidences of debt, except in compromise or settlement of debts existing against the corporation when it became extinct, and they shall have no power to levy taxes."

SEC. 11. "That there is hereby levied within all the taxing districts which may be organized under this act a tax of one dollar on every hundred dollars of taxable property, and on all merchants and privileges a tax equal to the general State tax, for the purpose of the government of the same. The property shall be assessed by the secretary and financial agent, and for this purpose he is vested with all the power conferred by law on the collectors of State and county taxes," &c.

SEC. 12. "That it shall be the duty of said board of commissioners, after the assessment shall have been made, to make an estimate of the amount it will require to defray the expenses of this

14 district government, economically administered, and what per cent. of said levy of one dollar it will require to pay the same: Provided, That no more than fifty cents on the one hundred dollars' worth of property and a tax on privileges equal to the State tax shall be collected to defray the current expenses of such taxing district, but the remainder of the levy or any portion of it may be collected for the purpose of paying or compromising any debt of the extinct corporation or for paying the interest on such debt and creating a sinking fund for the payment of the principal."

SECTION 15. "Any taxing district established under this act shall be known by the name of the town or city at the time the corporation became extinct."

Petitioner has been advised that from the terms and provisions of said act of April 1, 1881, aforesaid, under which the corporation now known as the taxing district of Brownsville has been
15 organized and is now in full operation, comprising the same territory and population as the corporation formerly known as the city of Brownsville, and consequently being its successor, said taxing district of Brownsville is liable for all its predecessor's debts, contracts, and obligations, and is subject to the like remedies as originally existed against the city of Brownsville prior to the repeal of its charter in favor of petitioner and other creditors in the enforcement of their rights.

Petitioner would further show that the act of April 1, 1881, has been amended by an act of the General Assembly of Tennessee, of date April 4, 1885, entitled "An act to amend an act to establish taxing districts of the second class and to provide the means of local government therefor," passed April 4, 1881.

Section 1 of said act provides that the board of commissioners — as recorder, whose duties shall, among other things, be to make
16 out the tax levies and collect the taxes, &c., as was provided to be done by said act of April 1, 1881, by the secretary and and financial agent; but in said section one it is further provided as follows: "But if said commissioners shall not deem it proper to select a recorder as above provided for or shall fail to do so, then the duties, rights, and powers of the president, treasurer, and secretary and financial agent of said taxing district shall be and remain the same as was fixed under the act of April 1, 1881." Petitioner has been informed and charges that no such selection has been made by said commissioners of such recorder as provided by the act of April 4, 1885, and consequently said duties as to assessment and collection of taxes remain, as provided by the act of April 1, 1881, in the defendants in this case.

Sec. 2 of said act of April 4, 1885, further amends said act of April 1, 1881, by providing "that sec. 8 of act of April 1, 1881, be so amended that the board of commissioners shall
17 have power by ordinance within the district to levy taxes upon all property taxable by law for State purposes, to levy taxes upon all privileges and polls taxable by law for State purposes, to appropriate money and funds for the payment of all debts and current expenses of the district," &c.

Petitioner is advised that under the powers conferred by the aforesaid acts, as well as under the authority conferred by the act originally incorporating the city of Brownsville and the act authorizing the issuance of the bonds and coupons, upon the latter of which the judgments aforesaid were rendered in favor of petitioner's intestate, the defendants in this case have the power and authority and it is their legal duty to collect the taxes heretofore levied for the payment of petitioner's judgments aforesaid, and to levy a further tax on all the taxable property within the limits of said corpora-
18 tion sufficient to pay the amount due on said judgments and all costs, and also all costs incurred in the mandamus proceeding aforesaid against the city of Brownsville.

Petitioner is advised that he is entitled to *alias* writs of mandamus in those cases where peremptory writs have heretofore been granted, and that he is entitled to peremptory writs in the cases where alternative writs have been granted.

Petitioner is advised that upon the organization and reincorporation of the city of Brownsville under the name and style of The Board of Commissioners of the City of Brownsville (a taxing district of the second class, having less than 5,000 population), the defendants herein named, that said corporation and defendants became liable to all of the remedies which originally existed against its predecessor, the city of Brownsville, and that the clauses in said acts of January 31, 1879, and acts amendatory thereof, providing that the said defendants should have no power to assess and
19 *and* levy taxes for payment of petitioner's and other claims, are null and void, as being in violation of the State and Federal Constitutions as such is and was an attempt to defraud petitioner of the only remedy for the collection of his said judgments, said remedies being a part of the contract creating the debts upon which said judgments were founded. If petitioner is mistaken as to the invalidity and unconstitutionality of said clauses in the acts aforesaid prohibiting the defendants, as the commissioners of the taxing district of Brownsville, from levying and collecting taxes sufficient to pay petitioner's judgments aforesaid, then, as he is advised, the defendants have the power and authority under sec. 2 of the act of April 4th, 1885, hereinbefore cited, and as an amendment to the act of January 31st, 1879, to make said levy and collections. Petitioner would show that by secs. 11 & 12 of the act of April 1st, 1881, before referred to, a tax of fifty cents on the $100
20 of all the taxable property and privileges was levied for the year 1881, and is now authorized to be levied each year within the limits of the defendant corporation for the express purpose of paying the judgments of the petitioner and other creditors of said corporation; that petitioner is not advised as to whether defendants have made this levy, and, if so, how much of the same has been collected, but he is advised that he is entitled, if any, to have the same applied to the payment of his said judgments, and to have a further levy of fifty cents each year hereafter to be collected and applied to the payment of petitioner's judgments aforesaid and the costs incurred in said causes and in the mandamus proceedings

aforesaid against the city of Brownsville to enforce the collection of the same; that the defendant corporation, The Taxing District of Brownsville, and its predecessor, the city of Brownsville, have no assets or means of payment of petitioner's judgments
21 aforesaid, and petitioner's only remedy to enforce the collection of his judgments is that awarded by the act authorizing the issue of the bonds from which the coupons were detached upon which said judgments were obtained, and petitioner is advised that said remedy remains in full force against the defendants as the municipal authorities of the taxing district of Brownsville, and can be invoked against them as effectually as it could have been against the corporate authorities of the city of Brownsville before its charter was repealed.

The premises considered, petitioner prays that the board of commissioners of the taxing district of Brownsville—W. M. Scott, president; Joseph Sternberger, treasurer, and John R. Head, secretary and financial agent, of the taxing district of Brownsville—be made parties defendants to this petition; that an alternative writ of mandamus issue against them commanding them to appear and
22 show cause why a peremptory writ of mandamus should not issue against them commanding them to levy and collect a tax sufficient to pay petitioner's judgments, and that said defendants, in answer to the alternative writ, be required to answer under oath and make discovery of the levies made by the mayor and aldermen of the city of Brownsville for the benefit of petitioner's intestate in payment of his judgments aforesaid, the assessed value of the property upon which such levies were made, the amount of the levies both upon the property and privileges in the city of Brownsville, and how much of the same has been collected and how much remains uncollected, and whether they have levied the fifty-cent tax authorized by the act of April 1, 1881, and, if so, how much of said levy has been collected, and that they pay into the registry of this court or to petitioner all collections so made from these sources, and upon hearing of defendants' answer to the
23 alternative writ of mandamus petitioner prays for an alternative writ of mandamus commanding defendant to levy and collect a tax sufficient to pay petitioner's judgments aforesaid and all costs on same and all costs incurred in his mandamus proceeding heretofore had by his intestate to collect the same.

CRAFT & COOPER,
Sol's for Petitioner.

STATE OF TENNESSEE, *Shelby County:*

Personally appeared before the undersigned, clerk of the circuit court of the United States for the western district of Tennessee, L. P. Cooper, one of the counsel for petitioner in the above petition, who, being sworn, makes oath that the matters and things stated in said petition are true to the best of his knowledge, information, and belief.

L. P. COOPER.

Sworn to and subscribed before me this December 15, 1886.
BELL W. ETHERIDGE, *Clerk.*

24 Know all men by these presents that we, John Loague, adm'r, and L. P. Cooper, — held and firmly bound unto said defendants in the sum of two hundred and fifty dollars, but to be void on condition that the said defendants do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiff in the circuit court of the United States for the western district of Tennessee, at said Memphis, against the said defendants, and also on failure of the said plaintiff to prosecute the said suit with effect, and also on failure of the defendants; if convicted, to pay said costs.

Witness our hands and seals this 19th day of March, A. D. 1886.

JOHN LOAGUE, *Adm'r*, [L. S.]
Per L. P. COOPER, *Att'y.* [L. S.]
L. P. COOPER. [L. S.]

[Endorsed:] No. 2888. U. S. circuit court, western district Tennessee. John Loague, adm'r R. D. Baker, *vs.* Taxing District of Brownsville, Tenn., *et als.* Cost bond. Craft & Cooper, attorneys.

25 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1885, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 27th day of March, A. D. 1886, in the following cause, to wit:

JOHN LOAGUE, Adm'r of R. D. Baker, Deceased, Plaintiff,
vs.
THE COM'RS OF THE TAXING DISTRICT OF BROWNSVILLE, Defendants. } No. 2888.

It appearing from the records in the cases of R. D. Baker *vs.* The Mayor and Aldermen of the City of Brownsville, Nos. 2098, 2268, 2396, and 2543 in this honorable court, and from the petition of the administrator of R. D. Baker, deceased, on file, that R. D. Baker, the intestate of the petitioner, obtained a judgment in case No. 2098, in this court, March 1st, 1876, for $2,628 and costs, and in No. 2268, on December 20th, 1876, for $822.50 and costs, and in 2396,
26 on the 21st of December, 1877, for $822.66 and costs, and in No. 2543 for $821.60 and costs, and that no part of said judgments have been paid except $500, July 30, 1877, and $700, April 10th, 1878, which have been credited on the first of said judgments; that said judgments were obtained upon coupons which had been detached from bonds which had been legally and regularly issued by the mayor and aldermen of the city of Brownsville, the

predecessors of the commissioners of the taxing district of the city of Brownsville, under and by virtue of the laws of the State of Tennessee authorizing their issue and authorizing the levy by the authorities of said corporation to levy and collect a tax to pay said coupons as they fell due and to create a sinking fund sufficient to pay the bonds from which said coupons had been detached as they matured; that petitioner is now the holder and owner of said judgments; that petitioner's intestate in his lifetime, after a *nulla*
27 *bona* had been made on each of them by proper proceedings in this court, obtained peremptory writs of mandamus against the defendants in said causes as follows, to wit: In case No. 2098, which is numbered in the mandamus proceedings No. 2203, a peremptory writ of mandamus was obtained by petitioner's intestate on the 30th of March, 1877, and in case No. 2268, which — numbered in the mandamus proceedings 2299, a peremptory writ of mandamus was obtained on the 14th of February, 1877, and in case No. 2396, which is numbered in the mandamus proceedings 2463, a writ of peremptory mandamus was obtained July 10th, 1878, and that a *nulla bona* return has been made in case No. 2543; it further appearing that the records of this court do not show and petitioner has been unable to ascertain what levies and collections of taxes have been made under the peremptory writs of mandamus aforesaid by the mayor and aldermen of the city of Brownsville;
28 and it further appearing that the General Assembly of the State of Tennessee, on the 24th of February, 1879, passed an act repealing the charter of the city of Brownsville, which act expressly provided that it should not be so construed as to impair the obligation of existing contracts into which said corporation theretofore entered; and it further appearing that by an act passed March 14, 1877, it was provided, among other things, that the Governor of the State of Tennessee should appoint an officer, to be known as the receiver and back-tax collector, whose duty it should be to collect the back taxes which remained due and uncollected in all the extinct municipalities whose charters had been repealed; and it further appearing that no such officer has ever been appointed and qualified for the extinct municipality of the city of Brownsville, although diligent efforts have been made to that end by
29 petitioner and other creditors; it further appearing that under the act of April 1st, 1881, entitled An act to establish taxing districts of the second class, and to provide the means of local government therefor, the same people and the same territory comprising the former city of Brownsville have organized and established a municipal corporation, known as commissioners of the taxing district of Brownsville, of whom W. M. Scott is president, John R. Head, treasurer, and Joseph Sternberger, secretary and financial agent; and it further appearing that said last-named municipal corporation is the successor of the extinct municipal corporation formerly known as the mayor and aldermen of the city of Brownsville; and it further appearing that by the 11th section of the act under which said new corporation has been organized a tax is expressly levied within all the taxing districts organized under

said act of $1.00 on every $100 of taxable property, and all merchants and privileges a tax equal to the general State tax, &c.; and it further appearing that the 12th section of said act provides that the commissioners shall estimate how much of said tax it will require to defray the expenses of this district government, economically administered, and what per cent. of said levy it will require to pay the same, and provides that no more than fifty per cent. of said tax shall be collected to pay the current expenses of such taxing district, and that the remainder of the levy or any portion of it may be collected for the purpose of paying or compromising any debt of the extinct corporation or of paying the interest on such debt, and created a sinking fund for the payment of the principal, it is therefore ordered by the court that the said commissioners of the taxing district of Brownsville—W. M. Scott, president; Joseph Sternberger, treasurer, and John R. Head, secretary and financial agent, of Brownsville—do appear on the 24th day of May, 1886, and show cause, if any they can, why the peremptory mandamus prayed for by petitioner in his petition filed herein on the 19th day of March, 1886, should not issue as prayed for in said petition, and that a copy of this order and of said petition be served upon said parties forthwith.

Order to Show Cause. Ret'd & Filed M'ch 29, 1886. *Bell W. Etheridge, Cl'k; W. B. Weisiger, D. C.*

Circuit Court of the United States, Western District of Tennessee.

JOHN LOAGUE, Adm'r of R. D. Baker, Dec'd,
vs.
THE COMMISSIONERS OF THE TAXING DISTRICT OF BROWNSVILLE—W. M. Scott, President; Joseph Sternberger, Treasurer, and John R. Head, Secretary and Financial Agent, of Brownsville. } No. 2888.

It appearing from the records in the cases of R. D. Baker *vs.* The Mayor and Aldermen of the City of Brownsville, Nos. 2098, 2268, 2396, & 2543 in this honorable court, and from the petition of the administrator of R. D. Baker, deceased, on file, that R. D. Baker, the intestate of the petitioner, obtained a judgment in case No. 2098 in this court March 1st, 1876, for $2,628 and costs, and in No. 2268, on December 20, 1876, for $822.50 and costs, and in No. 2396, on the 21st of December, 1877, for $822.66 and costs, and in No. 2543, for $821.60 and costs, and that no part of said judgments have been paid, except $500, July 30, 1877, and $700, April 10th, 1878, which have been credited on the first of said judgments; that said judgments were obtained upon coupons which had been detached from bonds which had been legally and regularly issued by the mayor and aldermen of the city of Brownsville, the predecessors of the commissioners of the taxing district of the city of Brownsville, under and by virtue of the laws of the State of Tennessee authorizing their issue and authoring the levy by the authorities of said corporation to levy and collect a tax to pay said coupons as

they fell due, and to create a sinking fund sufficient to pay the bonds from which said coupons had been detached, as they matured; that petitioner is now the owner and holder of said judgments; that petitioner's intestate in his lifetime, after a *nulla bona* return had been made on each of them, by proper proceedings in this court
34 obtained peremptory writs of mandamus against the defendants in said causes, as follows, to wit:

In case No. 2098, which is numbered in the mandamus proceedings No. 2203, a peremptory writ of mandamus was obtained by the petitioner's intestate on the 30th of March, 1877, and in case No. 2268, which — numbered in the mandamus proceedings 2299, a peremptory writ of mandamus was obtained on the 14th of February, 1877, and in case No. 2396, which is numbered in the mandamus proceedings 2463, a writ of peremptory mandamus was obtained July 10th, 1878, and that a *nulla bona* return has been made in case No. 2543. It further appearing that the records of this court do not show and petitioner has been unable to ascertain what levies and collections of taxes have been made under the peremptory writs of mandamus aforesaid by the mayor and aldermen of the city of Brownsville; and it further appearing that the General As-
35 sembly of the State of Tennessee, on the 24th of February, 1879, passed an act repealing the charter of the city of Brownsville, which act expressly provided that it should not be so construed as to impair the obligation of existing contracts into which said corporation theretofore entered; and it further appearing that by an act passed March 14th, 1879, it was provided, among other things, that the Governor of the State of Tennessee should appoint an officer, to be known as the receiver and back-tax collector, whose duty it should be to collect the back taxes which remained due and uncollected in all the extinct municipalities whose charters had been repealed; and it further appearing that no such officer has ever been appointed and qualified for the extinct municipality of the city of Brownsville, although diligent efforts have been made to that end by petitioner and other creditors; it further appearing that under the act of April 1st,
36 1881, entitled An act to establish taxing districts of the second class, and to provide the means of local government therefor, the same people and the same territory comprising the former city of Brownsville have organized and established a municipal corporation, known as the commissioners of the taxing district of Brownsville, of whom W. M. Scott is president, John R. Head, treasurer, and Joseph Sternberger, secretary and financial agent; and it further appearing that said last-named municipal corporation is the successor of the extinct municipal corporation formerly known as the mayor and aldermen of the city of Brownsville; and it further appearing that by the 11th section of the act under which said new corporation has been organized a tax is expressly levied within all the taxing districts organized under said act of $1.00 on every $100 of taxable property, and all merchants and privileges a tax
37 equal to the general State tax, &c.; and it further appearing that 12th section of said act provides that the commissioners

shall estimate how much of said tax it will require to defray the expense of this district government, economically administered, and what per cent. of said levy it will require to pay the same, and provides that no more than fifty per cent. of said tax shall be collected to pay the current expenses of such taxing district, and that the remainder of the levy or any portion of it may be collected for the purpose of paying or compromising any debt of the extinct corporation, or for paying the interest on such debt, and creating a sinking fund for the payment of the principal, it is therefore ordered by the court that the said commissioners of the taxing district of Brownsville—W. M. Scott, president; —— ——, treasurer, and Joseph
38 Sternberger, secretary and financial agent, of Brownsville—do appear on the — day of ——, 188–, and show cause, if any they can, why the peremptory mandamus prayed for by petitioner in his petition, filed herein on the — day of ——, 188–, should not issue as prayed for in said petition, and that a copy of this order and of said petition be served upon said parties forthwith.

Marshal's Return.

At Brownsville, Haywood Co., Tenn., and on Monday, 29th day of March, 1886, I personally read and fully made known the contents of the petition and order to show cause in this cause upon W. M. Scott, Joseph Sternberger, and John R. Head, they together comprising the board of commissioners of the taxing district of Brownsville, Tenn., and at same place and on same date I further served upon W. M. Scott, as president of said board of commissioners of said the taxing district of *of* Brownsville a certified copy of the petition & order in this cause.

JAS. H. FREEMAN,
U. S. Marshal,
By CH'S S. TALIAFERRO, *Deputy.*

39 *Motion to Quash Alt. Writ of Mandamus. Filed July* 6, 1886.
Bell W. Etheridge, Clk.

Circuit Court of the United States, Western District of Tennessee.

JOHN LOAGUE, Adm'r of R. D. Baker, Dec'd,
vs.
THE COMMISSIONERS OF THE TAXING DISTRICT OF BROWNSVILLE. } No. 2888.

The defendants appear, by attorney, and move to quash the alternative writ of mandamus issued in this cause upon the following grounds:

First. As to the entire writ: Because the several judgments described in the petition and writ were not rendered against defendants, but against the mayor and aldermen of the city of Brownsville, and have never been revived against these defendants.

Second. Because neither the act of the Legislature of Tennessee under which the taxing district of Brownsville was organized nor

the amendments thereto confer on defendants the power to levy taxes for the payment of the judgments now sought to be enforced, but expressly withhold such power from them.

40 And as to so much of said alternative writ as requires defendants to show cause why they should not levy a tax to pay the judgments alleged to have been recovered by petitioner's intestate against the mayor and aldermen of the city of Brownsville on the first day of March, 1876, defendants move to quash the same, in addition to the grounds hereinbefore set forth as to the whole writ, because the petition and writ show on their face that said judgment was rendered more than ten years before the filing of the petition or the issuance of the writ, and it is therefore barred by the statute of Tennessee contained in section 3473 of the Code of Tennessee of 1884 prescribing a limitation of ten years on suits on judgments and decrees of courts of record of this State or any other State or government, and said judgment, being thus barred, cannot be enforced by any process of this court in the nature of an execution.

BOND & RUTLEDGE,
SMITH & COLLIER,
Atto's for Defendants.

41 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof begun and held for its May term, A. D. 1886, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 7th day of August, A. D. 1886, in the following cause, to wit:

JOHN LOAGUE, Adm'r of R. D. Baker, Deceased, Plaintiff,
vs.
COMMISSIONERS OF THE TAXING DISTRICT OF BROWNSVILLE, Defendant. } No. 2888.

By the agreement of counsel in open court and for satisfactory reasons to the court appearing, it is hereby ordered by the court that this suit be continued to the next term of this court, with leave, however, to apply for an order to set aside the order of continuance entered herein.

42 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof begun

and held for its November term, A. D. 1886, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 29th day of November, A. D. 1886, in the following cause, to wit:

JOHN LOAGUE, Administrator, Plaintiff,
vs.
TAXING DISTRICT OF BROWNSVILLE, Defendant. } No. 2888.

On motion of the defendants, they have leave to amend their motion to quash the alternative writ of mandamus by adding the following additional ground of the motion, viz., this petition nor affidavit show any demand upon these defendants to levy the tax which it is sought now to compel them to do.

43 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at the regular term thereof begun and held for its November term, A. D. 1886, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 29th day of November, A. D. 1886, in the following cause, to wit:

JOHN LOAGUE, Administrator, Plaintiff,
vs.
TAXING DISTRICT OF BROWNSVILLE, Defendant. } No. 2888.

Come the respective parties to this case, by their several attorneys, when the same came on to be heard upon the motion to quash and dismiss, heretofore entered therein, and the same was heard and argued and was taken under advisement by the court.

44 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof begun and held for its November term, A. D. 1886, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 4th day of February, A. D. 1887, in the following cause, to wit:

JOHN LOAGUE, Adm'r of R. D. Baker, Dec'd, Plaintiff,
vs.
COMMISSIONERS OF TAXING DISTRICT OF BROWNSVILLE, Defendants. } No. 2888.

In this cause, it being suggested and proven that the taxing district of Brownsville is the corporation formerly known as the city of

Brownsville, against which the judgments were rendered upon which the petition for an alternative writ of mandamus is based, and which are fully set forth in said petition, it is therefore ordered by the court that said judgments stand against the defendant in the name of
The Taxing District of Brownsville. The motion of counsel
45 for the defendant to quash the alternative writ granted in this case, treated by agreement as a demurrer to the petition, having been argued upon a former day of this term and submitted to the court, and the court, having carefully considered said motion or demurrer, adjudges that the same be overruled; that it is an insufficient answer to the order to show cause, and that the defendant pay the costs of said motion or demurrer; and upon the application of counsel for the defendant for further time to answer to said rule to show cause why a peremptory writ shall not issue the said defendant is given leave to make further answer within sixty days.

46 *Ans. to Alt. Mandamus. Filed May* 24, 1887. *John B. Clough, Clerk.*

Circuit Court of the United States, Western District of Tennessee.

JOHN LOAGUE, Adm'r of R. D. Baker, Deceased,
vs.
THE BOARD OF COMMISSIONERS OF THE TAXING DISTRICT OF THE CITY OF BROWNSVILLE. } No. 2888.

Return and answer.

To the honorable the judges of the circuit court of the United States for said western district of Tennessee, sitting at Memphis:

The board of commissioners of the taxing district of Brownsville—W. M. Scott, president; Joseph Sternberger, secretary and financial agent, and J. R. Head, treasurer—for return or answer to the alternative writ of mandamus herein awarded and directed to them requiring them "to show cause, if any they have, why they should not be commanded to proceed without delay to collect the tax heretofore levied and remaining uncollected on said tax books heretofore assessed for the payment of plaintiff's said judgment and to pay the same to the plaintiff herein, and why they should not be
commanded, on or before the next regular assessment of
47 taxes, as provided by law, to proceed to levy an additional tax sufficient to pay the balance of said judgment," say that they have no power or authority in law to collect said taxes; that the tax "heretofore levied and remaining uncollected on said tax books heretofore assessed for the payment of plaintiff's said judgment," as alleged in said writ or petition for mandamus, was levied, if levied at all, by the board of the mayor and aldermen of the city of Brownsville, and that the charter of said corporation was repealed by the Legislature of Tennessee by chapter 27 of the Acts of 1879, page 41, and the power and authority to collect law taxes mentioned were vested in a back-tax collector or receiver, to be appointed by the Governor of the State, who alone was authorized to collect said tax.

Said office was created by the Legislature of Tennessee—Acts of Tennessee, 1879, page 127. They say further that they should not be required or commanded by mandamus to levy an additional tax sufficient to pay the balance of plaintiff's judgments or any other tax to pay said judgments, because they have no power or authority to levy any tax whatever
48 to pay judgments and indebtedness such as represented by plaintiff. The people of Brownsville were organized into a taxing district under the general law of the State (Acts of 1881) creating taxing districts of the second class, and the power to levy taxes was expressly withheld from said taxing districts and the officers of the same, and reverted to the Legislature of the State, with whom alone the power and authority are lodged to levy taxes, and in the way and manner and for the amount set out in said act and subsequent acts of the Legislature of Tennessee. This power, being an express statutory power, must be strictly construed and strictly pursued, and cannot be and has not been delegated to the several taxing districts of the second class of the State of Tennessee, but is exercised only by the Legislature of the State, and that power even is limited and controlled by the act creating taxing districts of the second class and subsequent acts of said Legislature.

The commissioners aforesaid further answer and say that they should not be required to assess or levy this tax nor should
49 the same be levied or assessed through them or either of them in any way or manner for the purpose of paying the judgments of plaintiff or any part thereof, because the "board of mayor and aldermen," constituting the old corporation of the city or town of Brownsville before its charter was repealed, had no power or authority in law to levy a tax for such purposes, and consequently no power or authority to levy or assess such tax devolved upon the taxing district of Brownsville as the successor of said corporation formerly known as "the board of mayor and aldermen of the city of Brownsville," if, indeed, it be its successor; and if the old corporation attempted to exercise the power of levying or assessing a tax to pay plaintiff's judgment or any part thereof it was *ultra vires* and without authority of law; that the power and authority to issue the bonds and levy a tax to pay the interest thereon, upon which the plaintiff's suits were founded, was given to Brownsville by the act of 1870 by the Legislature of Tennessee, but before the
50 contract was completed or the election under said act of 1870 held by Brownsville or the bonds issued the said act of 1870 was repealed and abrogated by the constitution of the State of Tennessee, which went into effect May 5th, 1870. Said election ordering the issue of these bonds was not held until the 11th day of June, 1870, at which election 139 votes were given for bonds and no votes against bonds; but they state that at the time of said election the citizens of Brownsville entitled to vote in the election held on that day were at least 546 in number, and therefore Brownsville had no authority in law to lay a tax to pay the coupons or interest thereon, and have no power or authority devolved upon the taxing district of Brownsville to levy or assess a tax for such purpose. Defendants further

say that these three judgments in favor R. D. Baker against the mayor and aldermen of Brownsville referred to in the petition for mandamus, and also the judgments awarding the peremptory
51 writ of mandamus shown in said petition to have been heretofore issued on one of said judgments, were all obtained by default, and the *the* return to the alternative writ in the other case was striken out by the court after overruling a demurrer, and that neither the demurrer nor return raised the question of want of power in the corporation to levy a tax, because the act of February 8, 1870, had been abrogated by the constitution before the election on June 11, 1870, and before the issuance of the bonds under said election. Wherefore these defendants pray the judgment of this court in the premises, etc., and that they may be herein dismissed.

BOND & RUTLEDGE,
Attorneys for Defendants.

HAYWOOD COUNTY, *State of Tennessee:*

W. M. Scott, Joseph Sternberger, and J. R. Head, being duly sworn, depose and say that the statements made in the foregoing return or answer in this cause are true to the best of their knowledge, information, and belief.

W. M. SCOTT.
JOE STERNBERGER.
J. R. HEAD.

Subscribed and sworn to before me on this 23d day of May, A. D. 1887.

J. W. BROWN,
Clerk County Court.

52 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof begun and held for its May term, A. D. 1887, at the United States courthouse, in the city of Memphis, in said district, on, to wit, the 22d day of November, A. D. 1887, in the following cause, to wit:

JOHN LOAGUE, Administrator, Plaintiff,
vs.
TAXING DISTRICT OF BROWNSVILLE, Defendant. } No. 2888.

Upon motion and for satisfactory reasons to the court appearing it is hereby ordered by the court that the above-styled suit be, and it is hereby, continued to the next term of this court, commencing next Monday morning.

53 *Motion to Quash. Filed Ap'l 2d,* 1888. *J. B. Clough, Clerk.*

Circuit Court of the United States, Western District of Tennessee.

JOHN LOAGUE, Adm'r,
vs.
TAXING DISTRICT OF BROWNSVILLE. } No. 2888.

John Loague, adm'r, comes, by his attorneys, Craft & Cooper, and moves to quash the answer of defendants to the alternative writ of mandamus because said answer is insufficient in law, and further moves for a peremptory writ of mandamus commanding defendants to levy and collect a tax sufficient to pay off and satisfy petitioner's judgments and interest and all costs.

CRAFT & COOPER,
Att'ys for Petitioner, John Loague, Adm'r.

54 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1887, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 11th day of April, A. D. 1888, in the following cause, to wit:

JOHN LOAGUE, Administrator, Plaintiff,
vs.
THE COMMISSIONERS OF BROWNSVILLE, Defendants. } No. 2888.

In this cause this day came the parties, by their respective attorneys of record as well as by counsel, when the same came on to be heard, and was argued before the court on the questions of law arising under the defendants' answer and return filed in this suit on May 24th, A. D. 1887, to the alternative writ of mandamus theretofore issued and served herein, and the court, wishing to take further time for the consideration thereof and of the questions of
55 law arising thereunder, takes same under advisement.

56 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof begun and held for its November term, A. D. 1887, at the United States

court-house, in the city of Memphis, in said district, on, to wit, the 26 day of May, A. D. 1888, in the following cause, to wit:

JOHN LOAGUE, Administrator, Plaintiff,
vs.
COMMISSIONERS OF BROWNSVILLE, Defendants. } No. 2888.

For satisfactory reasons to the court appearing, it is hereby ordered by the court that this cause be, and it is hereby, continued to the next term of this court.

57 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at the regular term thereof begun and held for its May term, A. D. 1888, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 31st day of July, A. D. 1888, in the following cause, to wit:

JOHN LOAGUE, Administrator, Plaintiff,
vs.
COMMISSIONERS OF BROWNSVILLE, Defendants. } No. 2888.

This day came the parties, by their attorneys, and petitioner moved to quash the answer or return of defendants made in this case to the alternative writ of mandamus heretofore issued and for a peremptory writ of mandamus, as prayed for in petitioner's petition. It is now, therefore, considered by the court, and is hereby so adjudged, that the said motion to quash said answer or return to the alternative mandamus be sustained, and that, there be-
58 ing no further or other return or defense interposed, the said motion for a peremptory mandamus be also sustained; and it now appearing that petitioner's intestate, R. D. Baker, recovered in his lifetime, as is set out in said petition, four several judgments against the city of Brownsville, which have all been properly revived against the defendants herein in favor of petitioner as administrator of said R. D. Baker in this court, where said judgments were rendered, and that said judgments were of the dates and amounts following, to wit: March 1, 1876, for $2,628.00; December 20, 1876, for $822.50; December 21, 1877, for $822.66; December 14, 1878, for $821.60, together with costs of suit in each judgment; and that executions issued under said judgments have been returned *nulla bona*, and that all of said judgments are now due and wholly unpaid, except that upon the judgment recovered on
59 March 1, 1876, there was paid on July 30, 1877, $500 and on April 10th, 1878, $700, and that peremptory mandamus should now issue against said defendants herein requiring them to levy and collect and pay over to petitioner a tax sufficient to pay each and all of said several judgments, with interest thereon, and

all costs on same and all costs incurred on former mandamus proceedings thereon and in this proceeding: It is therefore considered and ordered by the court that a peremptory writ of mandamus do issue accordingly.

60 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof begun and held for its May term, A. D. 1888, at the United States courthouse, in the city of Memphis, in said district, on, to wit, the 11th day of September, A. D. 1888, in the following cause, to wit:

JOHN LOAGUE, Administrator, Plaintiff,
vs.
COMMISSIONERS OF BROWNSVILLE, Defendants. } No. 2888.

This day came the said defendants, The Commissioners of the Taxing District of Brownsville, and presented to the court the defendants' bill of exceptions, and, on motion of defendants, by attorney, the same is now signed, sealed, and made a part of the record of this suit, and is hereby ordered to be filed, which is accordingly done.

61 *Bill of Exceptions. Filed Sep.* 11, 1888. *John B. Clough, Clerk.*

Circuit Court of the United States, Western District of Tennessee.

JOHN LOAGUE, Adm'r,
vs.
COM'RS OF TAXING DIST. OF BROWNSVILLE, TENN. } No. 2888.

The evidence on the trial of this case was the agreed statement of facts, signed by the attorneys for the plaintiff and the defendants and filed April 8, 1888, which is in the words and figures following:

Agreed Statement of the Facts in this Suit. Filed April 8, 1888.

Circuit Court of the United States, Western District of Tennessee.

JOHN LOAGUE, Adm'r, etc.,
vs.
BOARD OF COMMISSIONERS OF THE TAXING DISTRICT OF THE CITY OF BROWNSVILLE. } No. 2888.

To avoid the trouble and expense of making proof in the above-stated cause the counsel of plaintiff and defendants make the following agreement of facts: This agreement is considered as made in

this case and in the case of G. W. Norton against the same defendants in this court (No. 2933); but it is further agreed that the two causes shall be heard together by the court and the agreement is filed in both cases. Either party shall be at liberty to
62 introduce other proof at the hearing, if desired.

CROFT & COOPER,
For Plaintiff.
W. W. RUTLEDGE,
For Defendants.
SMITH & COLLIER,
For Defendants.

Facts.

The city of Brownsville was incorporated by act of the General Assembly of Tennessee passed February 24, 1870.

The records of the board of mayor & aldermen show the following proceedings had May 12, 1870:

"BROWNSVILLE, TENN., *May* 12, 1870.

"A call- meeting of the board of mayor and aldermen met at the mayor's office. Members being all present, the board was called to order. Reading the minutes of last meeting was dispensed with. Upon application of J. D. Smith, president of Brownsville and Ohio Railroad Company, and in pursuance of authority in us vested by act of General Assembly of State of Tennessee, passed February 8, A. D. 1870, the board of mayor and aldermen of the city of Brownsville hereby order and direct that an election be held in our said city on Saturday, the 11th day of June next, at which election the qualified voters of our said city will vote upon the proposition to issue the bonds of the corporation to be subscribed as stock in aid of Brownsville and Ohio railroad, and, in accordance with
63 the provisions of said act, said bonds to have twenty years to run and be payable in the city of St. Louis, Missouri, and bear interest at the rate of 8 per cent. per annum, said interest payable annually in said city, and said bonds to be issued to amount to the sum of fifty thousand dollars and be known as Brownsville railroad bonds. Said election is to be advertised in the Brownsville Bee, the county newspaper of Haywood county, for 20 days before said election. Said bonds are to be issued to and taken by Brownsville and Ohio Railroad Company in lieu of the sum of fifty thousand dollars heretofore voted and subscribed by this corporation to said company in pursuance of section 6 of said act of General Assembly of State of Tennessee of Feb'y 8, 1870. In voting at said election those voters who are in favor of the issuance of said bonds in lieu of said subscription shall have written or printed upon their ballots 'bonds' and those who are opposed to the issuance of said bonds shall have written or printed upon their ballots 'no bonds.' It is ordered that the sheriff of Haywood county give notice, by advertisement in the Brownsville Bee for twenty days, of the time, place, and purpose of holding said election, and shall open
64 and hold the same, at the usual voting place or places in the city of Brownsville, on Saturday, June 11th, 1870, and shall,

so soon thereafter as practicable, certify the result of said election to this board. Full power and authority is hereby given him to appoint judges and other officers of said election and to do all things else necessary and proper to carry into effect this order."

On the 13th of June, 1870, the sheriff of Haywood county, Tennessee, certified to the mayor and aldermen of the city of Brownsville that he did hold the election thus ordered, in conformity to the terms of the order, on the 11th of June, 1870, and that at said election one hundred and thirty-nine votes were polled, and the result was one hundred and thirty-nine votes were cast for "bonds" and none for "no bonds."

And on said 13th day of June, 1870, the said mayor and aldermen of the city of Brownsville did ordain as follows:

"On motion, the following ordinance was adopted, to wit: Whereas it appears from the certificate of Jno. L. Sherman, sheriff of Haywood county, that in pursuance of an ordinance of this board, passed 12th of May, 1870, that he did on the 11th day of June, 1870,
65 open and hold an election within the city of Brownsville upon the proposition to issue fifty thousand dollars corporation bonds running twenty years, bearing interest from date at eight per cent. per annum, payable in the city of St. Louis, Missouri, said bonds to be known as the Brownsville railroad bonds and to be issued in aid of the construction of the Brownsville and Ohio railroad, and that at said election one hundred and thirty-nine votes were cast in favor of said bonds and none against: It is therefore ordered by the board of mayor and aldermen of the city of Brownsville that the mayor, T. W. Tyus, subscribe to the Brownsville and Ohio Railroad Company the sum of fifty thousand dollars as stock, and that in payment of said subscription that he sign and issue to said Brownsville and Ohio Railroad Company fifty thousand dollars corporation bonds, said bonds bearing interest from date at the rate of eight per cent per annum, payable in the city of St. Louis, Missouri, twenty years from date, said interest to be paid annually, said bonds to be issued in aid of the construction of said Brownsville and Ohio railroad and to be known as the Brownsville railroad bonds."

On the first day of July, 1870, fifty thousand dollars of the bonds of the city of Brownville were issued, under and in pursu-
66 ance of the foregoing proceedings, payable July 1st, 1890, and the same were by said city of Brownsville paid and delivered to the Brownsville and Ohio Railroad Company in payment of a subscription theretofore made by said city of Brownsville for fifty thousand dollars of the capital stock of said railroad company, and said stock so paid for was delivered by said railroad company to said city of Brownsville and has ever since been held and owned by said city.

The following is a correct copy of one of the said fifty thousand dollars of bonds and the others are like unto it:

"$500. UNITED STATES OF AMERICA. $500.

"*City of Brownsville, State of Tennessee.*

"Brownsville railroad bond. Interest at eight per cent., payable annually.

"Know all men by these presents that the corporation of the city of Brownsville, Tennessee, is indebted to the bearer of this bond in the sum of five hundred dollars for value received, which the said corporation hereby promises to pay on the first day of July, in the year one thousand eight hundred and ninety, at the office or agency of said corporation, in the city of St. Louis, Missouri, with interest thereon from the first day of July, 1870, at the rate of eight (8) per centum per annum, payable annually at the said office or
67 agency on the first day of July of each year on the presentation and surrender of the annexed coupons as they severally become due. This bond is one of a series consisting of one hundred bonds for five hundred dollars each, numbered from one to one hundred, inclusive, amounting in the aggregate to fifty thousand dollars, and issued by authority of an act of the Legislature of the State of Tennessee passed February 8th, 1870.

"In witness whereof the city of Brownsville has caused these presents to be signed by its mayor and recorder this first day of July, 1870.

"T. W. TYUS, *Mayor.*
"JOHN CLINTON, *Recorder.*"

R. D. Baker became the holder and owner for value before maturity and without notice of any infirmity in said bonds other than that given him on the face of the bonds and by the constitution and laws of Tennessee of twenty of said bonds numbered 71, 72, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 92, 96, 97, 98, 99, 100, and of the coupons annexed to the said twenty bonds, and on November 4, 1875, instituted his suit against the said city of Brownsville, in the circuit court of the United States for the western district of Tennessee, upon the sixty interest coupons for $40 each taken from said bonds which fell due as follows: Twenty on the first day of July, 1873; twenty on the first day of July, 1874, and twenty on
68 the first day of July, 1875.

And did also, on the 23d day of October, 1876, institute his certain other suit against the said city of Brownsville, in said circuit court of the United States, upon the twenty coupons taken from said twenty bonds which fell due on the first day of July, 1876.

In the first of said suits the said R. D. Baker recovered judgment in said circuit court against the said city of Brownsville in March, 1876, for $2,628 and costs, and in the second he recovered judgment December 20, 1876, for $822.50 and costs.

The said R. D. Baker also sued in said circuit court on the twenty coupons of said bonds that fell due July 1, 1877, and recovered judgment thereon against said city of Brownsville on the 21st

December, 1877, for $22.66 and costs, and sued in said court on the twenty coupons of said bonds that fell due July 1, 1878, and recovered judgment against said city of Brownsville thereon on 14th December, 1878, for $821.60 & costs.

These are the judgments upon which the mandamus proceeding of John Loague, adm'r of R. D. Baker, *vs.* Board of Commissioners of Taxing District of Brownsville is based, which proceeding is the cause noted in the caption hereof now submitted to this
69 court upon this agreement of facts, in the record of which mandamus proceeding what has heretofore been done fully appears.

The mayor and aldermen of the city of Brownsville, at a meeting of said board held on March 18, 1871, took action, which is thus shown on the minutes of said board:

"On motion, the following ordinance was made and adopted: Be it ordained by the board of mayor and aldermen of the city of Brownsville, Tenn., That the Exchange Bank of St. Louis, in the State of Missouri, is hereby constituted & made the agency of the corporation of the said city of Brownsville, Tenn., for the purpose of paying the principal and interest as the same shall become due of fifty thousand of eight per cent. bonds issued by said corporation of Brownsville on the first day of July, 1870, and falling due on the first day of July, 1890; and the mayor is hereby authorised and instructed to collect promptly the taxes levied for the purpose of paying the interest on said bonds, and for the purpose of establishing a sinking fund for the redemption of the same, and to place on deposit at the said Exchange Bank of the city of St. Louis, by the first day of July of each and every year, a sufficient amount
70 in currency to redeem all of the coupons of said bonds falling due at that time and not otherwise redeemed.

The city of Brownsville paid the interest on said bonds for the years 1871 and 1872, and has paid the interest on some of them matured since for the years 1873, 1874, 1875, 1876, and 1877, but that upon the judgments aforesaid recovered by R. D. Baker nothing has been paid except what is shown by the petition in the mandamus proceedings of John Loague aforesaid.

It is admitted that at an election for mayor of Brownsville on January 7, 1871, there were 546 votes cast for mayor, and that on June 11, 1870, the citizens of Brownsville entitled to vote in the election held on that day were at least 546 in number. It is also admitted that the Brownsville and Ohio railroad was never built and has been abandoned.

It is also admitted that by an act of 1879 the charter of the city of Brownsville was repealed, and that a government was afterwards organized under the act of April 1, 1881. All of these acts and others thought applicable may be read from the books containing the acts of Tennessee.

It is also admitted that there was no subscription by the authorities of Brownsville to the Brownsville and Ohio railroad or to the corporation which preceded it, called the Brownsville and
71 Dyer County railroad, otherwise than is shown in the paper

immediately following this agreement before the passage of the act of February 8, 1870; and it is also admitted that no election was held as contemplated in the ordinance set out in said paper:

BROWNSVILLE, TENN., *May* 1, 1869.

"At a call-meeting of the board of mayor and aldermen held in the mayor's office. Members all present except Recorder Clinton. The board was called to order and Alderman B. J. Lea appointed recorder *pro tem.* The minutes of the last meeting were read and adopted. A communication was received from Messrs. R.S. Thomas (chairman), J. P. Wood, Jno. R. Watkins, J. M. Rutledge, W. W. Vaughn, D. A. Nunn, and J. P. Parker praying the board to order an election to vote a tax on the property in the corporation for the purpose of aiding in building the Brownsville and Dyer County railroad, which was received and ordered to be filed. On motion, the following ordinance was passed: Be it ordained by the board of mayor and aldermen, That the proposition for the board of mayor and aldermen to levy a tax of one per cent. per annum for five years on the taxable property of Brownsville to aid in the construction of the
72 Brownsville and Dyer County railroad, for which said tax the said railroad company is, after the last payment, to issue certificate of stock for the amount which is paid by the town of Brownsville, be submitted to the legal voters of Brownsville on the 18th day of May, 1869. Those in favor of said appropriation will vote 'for railroad tax'; those opposed to said appropriation will vote 'against railroad tax.'"

It is further admitted that the three judgments in favor of R. D. Baker against the mayor and aldermen of Brownsville referred to in the petition for mandamus, and also the judgment awarding the peremptory writ of mandamus shown in said petitions to have been heretofore issued on one of said judgments, were all obtained by default, and that the return to the alternative writ in the other case was stricken out by the court after overruling a demurrer, and that neither the demurrer nor return raised the question of want of power in the corporation to levy a tax, because the act of February 8, 1870, had been abrogated by the constitution before the election on June 11, 1870, and before the issuance of the bonds under said election.

This was all the evidence in the case, and to the ruling of
73 the court quashing defendant's return to the alternative writ of mandamus and ordering on this record and evidence a peremptory writ of mandamus to issue to defendants, as shown in the judgment of the court, and also to the rulings and orders of the court in overruling their motion to quash the alternative writ of mandamus, defendants except and tender this their bill of exceptions and pray that it be signed and sealed by the court and made a part of the record in this case, which is accordingly done.

Memphis, Tenn., September 11, 1888.

E. S. HAMMOND, *Judge.* [SEAL.]

74 *Writ of Error Bond. Filed Sept.* 15, 1888.

In the Circuit Court of the United States within and for the Western District of Tennessee.

JOHN LOAGUE, Adm'r, etc., *vs.* COM'S OF BROWNSVILLE. } 2888.

Know all men by these presents that we, The Taxing District of Brownsville, as principal, and H. C. Nolen and J. P. Head, as surety, are held and firmly bound unto John Loague, administrator of the estate of R. D. Baker, dec'd, in the sum of two hundred and fifty dollars, to be paid to the said John Loague, administrator, etc.; to which payment, well and truly to be made, we and each of us bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with — seals, signed, and dated this 16th day of August, A. D. 1888.

Whereas the above-named Taxing District of Brownsville has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the western district of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named Taxing District of Brownsville shall prosecute the said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise remain in full force and virtue.

H. C. NOLEN, [SEAL.]
Pres't of Dist.
H. C. NOLEN. [SEAL.]
J. R. HEAD. [SEAL.]

Acknowledged before me this Aug. 16, 1888, as to H. C. Nolen.
R. S. THOMAS,
Dep. Clk.

Acknowledged before me this 16 day of August, 1888, as to J. R. Head.
W. B. WEISIGER,
Deputy Clerk.

This bond is hereby approved on the date of its said acknowle-gement before the clerk.
E. S. HAMMOND, *Judge.*

75 THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, Western District of Tennessee:

I, as clerk of the circuit court of the United States for said western district of Tennessee, do hereby certify that the papers hereto attached

are a full, true, perfect, and correct copy of the originals and of the entire record and proceedings at Memphis, Tennessee, in said court, as the same now appear of record and upon the files in my office, in the following cause, to wit, John Loague, adm'r of R. D. Baker, deceased, *vs.* Commissioners of the Taxing District of the City of Brownsville, Tenn.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in the city of Memphis, Tennessee, this 22 day of September, A. D. 1888, and of the Independence of the United States the 113th year.

{ Seal of the Circuit Court of the United States for the District of West Tennessee. }

JOHN B. CLOUGH, *Clerk.*
—— ——, *D. C.*

[Endorsed:] No. 2888. Circuit court of the United States, western district of Tennessee. Jno. Loague, adm'r of R. D. Baker, *vs.* Commissioners of Taxing District of Brownsville.

76 UNITED STATES OF AMERICA.

To John Loague, adm'r of R. D. Baker, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October, 1888, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the circuit and western district of Tennessee, wherein The Board of Commissioners of the Taxing District of the City of Brownsville are plaintiffs in error and you are defendant in error, to show cause, if there be any, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable E. S. Hammond, judge of the district court of the United States for the western district of Tennessee, this 15 day of September, 1888.

E. S. HAMMOND, *Judge.*

[Endorsed:] No. 2888. Circuit court of the United States, western district of Tennessee. Citation. Jno. Loague, adm'r of R. D. Baker, *vs.* Commissioners of Tax'g Dist. of Brownsville. Filed the 15 day of Sept'r, A. D. 1888. J. B. Clough, clerk.

76*a* Executed by reading & fully making known contents of the within "citation" to John Logu, adm'r, &c., of R. D. Baker, this Sept. 21st, 1888.

T. B. ZANERY,
U. S. Marshal,
By L. W. SMITH, *Dep't.*

Serv., $2.00.

77 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the western district of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said circuit court, before you, between John Loague, administrator of the estate of R. D. Baker, deceased, plaintiff, and The Commissioners of the Taxing District of the City of Brownsville, defendant, a manifest error hath happened, to the great damage of the said commissioners of the taxing district of the city of Brownsville, as by complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1888, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Samuel F. Miller, Senior Associate Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, this 15th day of September, A. D. 1888, and 113th of American Independence.

{ Seal of the Circuit Court of the United States for the District of West Tennessee. }

J. B. CLOUGH, *Clerk.*

[Endorsed:] No. 2888. Circuit court of the United States, western district of Tennessee. Writ of error. John Loague, adm'r of R. D. Baker, *vs.* Commissioners of T. D. of Brownsville. Issued the 15 day of Sept., A. D. 1888. J. B. Clough, clerk.

77*a* Executed by reading and fully making known the contents of the within writ of error to John Logue, adm'r, &c., of R. D. Baker, this Sept. 21st, 1888.

T. B. ZANERY,
U. S. Marshal,
By L. W. SMITH, *Dep't.*

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78 (Circuit Court, W. D. Tennessee. January 25, 1887.)

LOAGUE, Adm'r, *v.* TAXING DIST. OF BROWNSVILLE.

1. Constitutional law—Obligation of contract—Municipal corporations—Repeal of charters—Taxation to pay debts of extinct municipalities.—If a municipal charter be repealed and the same inhabitants and territory be reorganized into another corporation, the latter is the successor of the former, both in the corporate obligation to pay the existing debts and those corporate powers of taxation conferred as a part of the remedy of the creditors, and any statutory prohibition of its exercise is void under the inhibition of the Federal Constitution against impairing the obligation of contracts.
2. Same subject—Mandamus against the successors of extinct municipalities—Judgments against municipal corporations.—Those agencies existing for the local government of a municipality are bound to perform such duties as are necessary to enforce the taxing power, although not especially designated for that purpose, if there be a general grant of the power of taxation to the municipality itself. This duty is implied from the general grant, whether it be conferred directly by statute upon the particular municipality or devolved upon it as the successor in corporate obligation through a grant to its predecessor; therefore a mandamus will lie to enforce, by taxation, the payment of judgments against the original corporation to be directed to the governmental agencies of the new corporation, they to proceed according to the general laws of the State governing the exercise of the taxing power by municipalities possessing the authority.
3. Same subject—Taxing districts of Tennessee—Case in judgment.—Under the legislation of Tennessee repealing municipal charters and reorganizing the inhabitants into taxing districts, contrived to compel creditors to accept a compromise of their debts at reduced amounts, the prohibitions of the exercise of the taxing power by the new local governments are void, so far as relates to those grants of that power to the old corporations, which enter into contracts as a part of the remedy of creditors, and the "taxing districts" may be compelled to exercise the power given by these original grants by proceeding, according to the general tax laws of the State, to certify to the county court clerk the necessary rate to pay the judgment to be extended upon the tax-books and collected as other taxes are collected. It is not necessary that the particular officials to perform this duty shall be designated in the statute, but the general grant to the corporation implies that the officials governing the municipality shall perform it, and it will be enforced by mandamus against the new commissioners who take the place of the former mayor and aldermen.
4. Same subject—Special sessions of Legislature—Subjects of legislation—Governor's call as a restriction of legislative power—

Constitution of Tennessee of 1870, art. 3, § 9.—It was not the intention of the constitution of Tennessee to require the Governor to define, in his call for an extra session of the Legislature, the details of the subjects of the legislation desired, but only in a general way to confine the business to particular subjects; therefore a call for legislation "to enable taxing districts to compromise their old debts" does not exclude legislation repealing former grants of taxing power to the taxing districts to pay those debts.

5. *Scire facias*—Revivor of judgments against extinct corporations—Suggestion of record only necessary.—Revivor of a judgment against the successor of an extinct municipal corporation is accomplished by a mere suggestion of record. A *scire facias* is not necessary before a mandamus can issue against the new corporation organized in place of the old. The practice examined and stated in relation to the effect of the legislation of Tennessee creating "taxing districts" in place of municipal corporations whose charters have been repealed.

79 6. Statute of limitations—Implied suspension—Repeal of municipal charter—Statutory obstruction of suit by the State—Equitable defense to mandamus.—If the State, with the deliberate purpose of obstructing the creditor, repeal a municipal charter, whereby there is no organization to be sued, and the creditor be disabled from proceeding, the time of such obstruction will be excluded from the limitation of the statute, the legislative intention to suspend it being implied, as in case of war. Moreover, it may be set up as an equitable defense in proceedings by mandamus.

7. Mandamus—To enforce judgment—Inadequate levy.—Although the court will not compel by *alias* writ of mandamus any further levy of taxation until there has been an exhaustion of former levies, by pursuing all legal remedies against delinquent tax-payers, this rule does not apply if the State and the corporation abandon the former levies, and obstruct their operation by legislation and other acts intended to prevent the creditor from realizing them.

8. Same subject—Nugatory mandamus—Statutory receiver to collect taxes—Appointment not compelled.—If the Governor of the State refuse to appoint a receiver authorized by statute to collect the taxes already levied by a municipal corporation whose charter has been repealed, the court will not undertake to compel an appointment by mandamus; because the writ will not be issued where it is likely to be nugatory and cannot be enforced.

9. Taxation—Permanent levies.—Nothing less than an explicit declaration of the statute that a tax levy is intended to be continuing and permanent will effectuate that result. It will not be implied or established by construction of ambiguous language.

10. Constitutional law—Impairment of contracts—Power of Legislature to repeal tax levies for municipal purposes.—Any taxes

levied by the Legislature for municipal purposes, or grants of power to a municipality to make such levies, may be repealed, if they be subsequent to the contract involved, as there is no protection under the Federal Constitution except for such powers of taxation as enter into and become a part of the contract itself and belong as a remedy to the creditor.

11. Same subject—Taxing district of Brownsville, Tennessee.—The legislation of Tennessee in relation to the "town" and "city" and "taxing district" of Brownsville examined, and held that all special methods of taxation granted to that municipality have been repealed; that the corporation has been placed under the general tax laws of the State, and that it is to those laws the creditors must resort for the enforcement of their judgments by mandamus where they are entitled to that writ against the taxing district as the successor of the old corporation.

At law. Petitions for mandamus.
Myers & Sneed and Craft & Cooper, for petitioners.
Bond & Rutledge and Smith & Collier, for defendants.
Before Jackson and Hammond, JJ.

HAMMOND, *J.*:

Following a public policy reviewed in its application to the city of Memphis in Meriwether *v.* Garrett, 102 U. S., 472, the Legislature of Tennessee, in 1879, inaugurated a plan of relief for insolvent municipal corporations, whereby it was expected they could escape the payment of their debts, unless the creditors would accept the "settlements" tendered them under the provisions of the legislation. The general plan was to repeal the charters, so that there should be no officials or agencies liable to judicial compulsion by mandamus, then to supply other agencies of local government invested with all the powers of the old municipalities, except the taxing power,
80 which was not only withheld, but conspicuously prohibited to those new organizations called "taxing districts." The taxes for carrying on the new contrivances were to be levied directly by the Legislature itself upon the taxables within their boundaries, and, that body not being amenable to any judicial coercion by mandamus, it was believed that the creditors were wholly without remedy. The Legislature then provided for a settlement with creditors upon the general basis of refunding the old indebtedness at the half, the amount at which the State "settles" or "compromises" its own indebtedness. The taxes to pay the interest and principal of the new bonds, like other taxes for municipal purposes, were to be levied directly by the Legislature; but provision is made that in default of such levy the "taxing districts" may themselves levy the necessary tax. Acts 1883, c. 170, p. 224. This act applies to all "taxing districts" of whatever class, and by its twentieth section "repeals all laws or parts of laws in conflict herewith."

Under this legislation the supreme court of Tennessee has held that by operation of the Constitution of the United States forbidding

a State to pass laws impairing the obligation of contracts these new "taxing districts" are simply the successors of the old corporations, so far as relates to the obligation to pay the indebtedness existing at the time of the repeal of the charters, and that creditors may proceed against them as such successors, the obligation resting upon the inhabitants of the particular territory. O'Connor *v.* Memphis, 6 Lea, 730, 738, 739; Luehrman *v.* Taxing Dist., 2 Lea, 425. The same doctrine is affirmed by the Supreme Court of the United States in Mobile *v.* Watson, 116 U. S. 289; S. C. 6 Sup. Ct. Rep., 398.

We have just held in Loudon *v.* Taxing Dist. (no opinion), the circuit and district judges on the bench, upon considerations entirely satisfactory to us, that it is the logical result of that principle, if it be not distinctly decided in the last-cited case, that any power of taxation provided as a means of paying their debts heretofore granted to the original municipalities devolves as readily as the obligation to pay them and by like operation of the Federal Constitution upon those successors, notwithstanding the attempted statutory prohibition. That power was a grant to the inhabitants of the particular municipal territory, and not to the designated officials through whose agency it was exercised; and those inhabitants may and must exercise the power, so far as the old creditors are concerned, through any new agencies existing by law and adapted to the work of levying and collecting taxes. As evidence of that adaptation it may be remarked that the "taxing districts" are especially authorized to exercise all the essential powers of taxation to pay the new bonds if the Legislature neglects that duty; and it is particularly worthy of notice, in view of the argument made at the bar, that a given agency of the municipal government must be designated and especially clothed by statute with the power to levy and collect taxes before the general power devolved as above mentioned can be exercised; that by the twelfth section of this very act of 1883 the power is not so conferred upon any designated agency of the new municipal government, but only upon "every municipal
81 corporation or taxing district which compromises its debts," etc. The whole argument of the defendant was that no given agency of the new governments could exercise the taxing power unless appointed by law to do so, yet this new legislation does not appoint any agency, but confers it in the most general terms, as did the old legislation, upon the municipality itself—that is, upon the inhabitants of that locality. This would seem to be a sufficient answer to the argument, for it can hardly be imagined that any further legislation is necessary to enforce this power in favor of the holders of the new bonds if occasion should require it, and the mandamus would necessarily run against the legislative and administrative officers of the taxing districts, just as we are here asked to order it—that is to say, it is a necessary implication from the general grant of the taxing power that the officials of the municipality exercising other legislative duties would be required to perform this. We do not imply the grant of taxing power as a product of the Federal Constitution, nor create it by judicial judgment; not at all, but we hold that the grant heretofore made to the inhabitants of the

given territory has never been taken away, and that while the agencies have been changed and the methods of taxation altered, other agencies and other methods have been provided upon which the law devolves the duty embodied in the general grant just as it would devolve it upon these self-same agencies were the courts required to act upon the general grant of taxing power under this twelfth section of the act of 1883.

Nor is there any practical difficulty in the way. The former method of having the municipalities make separate assessments and providing independent agencies for the collection of municipal taxes has been long since abolished by general law. Now the State officials make, through the agency of the county courts, one general assessment upon which all taxes are levied and collected. This is placed in the hands of the county clerk, and it is required "that cities and incorporated towns shall certify the rate of taxation levied by them to the clerk of the county court," and he extends them upon one tax-book in appropriately designated columns, etc.: Acts 1868, c. 102, § 2, p. 247; Acts 1875, c. 92, § 63, p. 159; Acts 1877, c. 73, § 6, p. 96; *id.*, § 8, p. 97; Acts 1881, c. 171, § 42, p. 255; Acts 1883, c. 105, § 42, p. 115.

Here, then, is adequate and complete machinery provided by general law for all municipal corporations possessing the general power of taxation whereby they may effectually exercise it, and, given the general grant to a certain body of people, it is a mistake to suppose that they need to have a statutory appointment of named officials to exercise it. Those appointed for the general purposes of the local government of that body of inhabitants may exercise the power, as they do all governmental powers of that local character.

It is only necessary, then, that we require the officials of the new government to certify to the county court clerk that rate which the judgment itself shows is needed to satisfy it upon the basis of an assessment already at hand; that the county court clerk extend that rate upon the tax-books, and that the other officials collect the tax so ascertained to be due from each tax-payer. It is a very
82 simple process and is the inevitable outcome of the decisions of the State and Federal supreme courts already cited. Once grant the taxing power to a body of people incorporated for local government as a part of the remedy given to holders of its bonds authorized by law, and it remains with them until the debt is paid and may be exercised as long as any machinery of local government is provided for them. The entire destruction of the machinery in all its parts and the relegation of the inhabitants to the general mass might accomplish the intended purpose of this legislation, but at the very moment that new agencies of incorporation and government are substituted for the old the inexorable rule of justice comes into play under our Constitution and the existing obligations must be paid. The vociferous statutory prohibitions of this legislation are void, both as to the new corporations and their new agencies, so far as concerns the old indebtedness. The new machinery succeeds to and takes the place of the old, finding its powers of action in the old grants of the taxing power in precisely the same way

that it finds the other elements of the contract obligation that cannot be impaired. Our general tax laws applicable to the whole State furnish conveniently the instrumentalities for the work of taxation, and there is no necesssity to decide how this principle would operate if they were wanting, whether we would compel an assessment, levy, and collection by the taxing district officials, and which of them would be selected by the court to perform the duty, etc. As it is, we have the assessment; we have an official to separately extend each levy on the collection book and other officials to collect the tax. The judgment itself shows the aggregate amount required, and a simple calculation and the making of a certificate of the rate is all that the municipal authorities need do to accomplish the work. Their duty to make the certificate comes from the original grant of the taxing power, coupled with the general tax laws of 1881 and 1883, authorizing the certificate to be made not by any specifically appointed officials, but by "cities and incorporated towns," implying obviously that the officials charged with the municipal government shall do this.

But certain special defenses are made in these causes that now require our attention. The Legislature repealed the defendant's charter in 1879, the judgments here involved being at that time unsatisfied in this court. Acts 1879, c. 27, p. 41. In 1881 the formation of "taxing districts of the second class" was authorized, and under that act such a "taxing district" was organized for Brownsville in 1883. Acts 1881, c. 127, p. 174. By these two acts "commissioners" were substituted for the formerly existing "mayor and aldermen," with all the usual authority, legislative, executive, and judicial, except the power to levy taxes, which was prohibited; but the act of 1879 especially enacted that nothing contained in it should impair the obligation of then existing contracts, and the act of 1881 "hereby levied" a tax of one dollar per hundred, one-half of which was to be applied to the current expenses and the other to the old debts. Specific power was also given to one of the "commissioners," called the "secretary and financial agent," to assess and collect this tax.

The general act of 1883, already noticed, relating to all tax-
83 ing districts had been passed, but by an act of 1885 the act of 1881 relating to "taxing districts of the second class" was amended, and section 2 gives the commissioners the most ample power to levy taxes and appropriate money to provide for the payment of "all the debts and current expenses of the districts." Acts 1885, c. 82, p. 162. It is apparent that, notwithstanding the general act of 1883 and its broad repealing clause, the Legislature (or rather the authors of this legislation relating to Brownsville) considered the act of 1881 as wholly unaffected by it. But by a subsequent act of 1885, at the extra session, the full powers given under the former act of that year were taken away, or rather limited to the payment of the "compromise" bonds only, the evident object of the last act being to correct this careless blunder of a departure from the general plan of relief already fully commented upon. Acts extra sess. 1885, c. 10, p. 75.

A question was made at the bar whether this last act of the extra

session could be made to fall within the terms of the Governor's call for an extra session, as otherwise it would be unconstitutional. Const. Tenn. 1870, art. 3, § 9. We think it does. It was not the intention to require the Governor to define with precision, as to details, the subjects of legislation, but only in a general, by his call, to confine the business to particular subjects. Mitchell *v.* Turnpike Co., 3 Humph., 455. Too great latitude of construction might, undoubtedly, abrogate the restriction of the constitution; but, on the other hand, a too rigid requirement in this regard would disastrously embarrass the executive and the Legislature, since the former could never with accuracy foretell what the legislative mind would adopt as pertinent to the general subject, and therefore could not specifically define the provisions, or even the special character, of the forthcoming legislation, while the latter could not always, if ever, determine with accuracy what might or might not be of too remote affinity with the call. Besides, it would be conferring on the Governor legislative powers never contemplated by the constitution to permit him to restrict the Legislature as to the details or character of its enactments. We think, therefore, notwithstanding the discrepancy between the call for legislation "to enable taxing districts to compromise their old debts" and legislation repealing former grants of power to levy taxes to pay them, that the act is not, in this regard, unconstitutional. The Legislature and the Governor might properly consider this repeal as a necessary means of reaching a "compromise." Acts extra sess. 1885, p. 7, where the call is printed; *Id.*, c. 10, p. 75, where the act is printed.

The next question arises upon the defendant's objection that these judgments have not been revived by *scire facias* against the new corporation. We do not think this necessary. By section 15 of the act of 1881 the "taxing districts established under this act shall be known by the name of the town or city at the time the corporation became extinct." So there was no change at all, even of the corporate name, except from "town" or "city" to "taxing district" of Brownsville; and that section further provides that "all suits by or against said district shall be brought by or against the board of commis-
84 sioners of the taxing district of Brownsville." These judgments were obtained against and stand in the name of the "board of mayor and aldermen of the city of Brownsville."

It is conceded at the bar that a mandamus against designated officials operates, without *scire facias* or other revivor, against their successors in office, and that a change of *personnel* is immaterial; but it is urged that here there has been an extinction of the corporate defendant to the judgment, and that it is as if an individual defendant should die, when there must be a revivor against his administrator or other successor. This court has general power to issue the writ of *scire facias* when applicable to its procedure, and the acts of Congress provide against the abatement of pending suits by the death of parties; but we are not aware of any Federal statute regulating the revivor of judgments, unless the process acts giving the same remedies of execution as are known to the State laws may be said to require us to follow the State practice in that regard. Rev. St., §§ 716,

916, 955, 956. But we do not find that the State statutes contain any special provisions different from the usual common-law procedure on this subject. General provision is made for the use of the *scire facias* to revive judgments upon the death of parties (Thomp. & S. Code Tenn., §§ 2987, 2988; M. & V. Code Tenn., 3701–3704), and against the abatement of all actions which may be revived by *scire facias* or upon mere motion, according to circumstances (Thomp. & S. Code Tenn., §§ 2845–2859; M. & V. Code Tenn., 3559–3570). Among these provisions is one that if the "decedent" has parted with his interest pending the suit it may be revived against "his successor in interest," instead of the representative or heir.

For the obvious reason that a corporation is supposed to be substantially immortal, and that a mere change in the *personnel* of its management does not require any notice in legal proceedings against it, none of these statutes, State or Federal, make any provision for the revivor of suits against "extinct" corporations, except that where the State proceeds to dissolve the corporation a decree of dissolution shall not extinguish its debts, but the court appoints a receiver of its property to pay the debts; and, if dissolved for any cause, they shall continue to exist for five years for the purpose of prosecuting and defending suits against them. Thomp. & S. Code Tenn., §§ 1493, 3426; M. & V. Code Tenn., 1720, 4163. These provisions of the code relate to private corporations, and are not applicable, perhaps, except as analogies, to public municipal corporations; but this court had occasion to consider them in relation to an extinct railroad corporation in Kelley *v.* Mississippi Cent. R. Co., 1 Fed. Rep., 564; S. C. 2 Flip., 581, and there the somewhat false and misleading analogy to the death of individual suitors is suggested. It applies with greater force here, and comes of pressing too far the doctrine that a corporation, either private or municipal, has an existence independent of the persons who compose it. The "law provides heirs, executors, or administrators for dead persons; but an extinct corporation must be represented by the individuals who originally composed it." *Id.*

Now, here the population of the town of Brownsville and all its accretions of individuals, from whatever source, constituted the
85 municipality known as the "town" or "city" or "board of mayor and aldermen" of Brownsville, and these same persons now compose the municipality known as the "taxing district" or "board of commissioners" of Brownsville. So, at most, we have only a change of name, and scarcely that in relation to the persons sued, whatever may be said as to their corporate rights, powers, or liabilities. Indeed, the Legislature itself, as above shown, enacts that the new corporation shall be known by the same name, and the change of designation for the suable style from "board of mayor and aldermen of the city of Brownsville" to that of "board of commissioners of the taxing district of Brownsville" is in itself not worthy of much consideration, even as a change of name; but a mere change of name for substantially the same party does not require a *scire facias*, and a suggestion of the fact upon the record is sufficient to meet the technical requirement that the execution and judgment must be consistent with each other, so that the record shall not stand with a

judgment against A and an execution against B, which is the only reason for any notice of the fact at all. Harwood *v.* Law, 7 Mees. & W., 206; Penoyer *v.* Brace, 1 Ld. Raym., 245; Fost. Sci. Fa., 99 *et seq.* The court said in Bosanquet *v.* Ransford, 11 Adol. & E., 520, that whether we proceed by *scire facias* or suggestion on the record depends on this point: "Whether new parties are to be introduced upon the record. The uniform course if new parties are introduced is by *scire facias.* Suggestion is applicable only to collateral facts affecting the same parties—as, for example, change of name, etc., and similar matters." S. C., 2 Q. B., 972, and 39 E. C. L., 285. Mr. Foster sums up the cases by saying: "In accordance with the above decisions, where there has been a mere nominal change of parties, as in the public officer of a joint-stock company, the real party being the company, a suggestion on the record of such a change of the public officer has been held sufficient without *scire facias.*" Fost. Sci. Fa., 103. It was so ruled in Webb *v.* Taylor, 1 Dowl. & L., 676; Fost. Sci. Fa., 104, 106, *et seq.*

Hence, we see that a revivor by *scire facias* is only required where new parties are to be charged with a liability. The reasoning of the above cases, there applied to such corporations as banks, etc., is more applicable to a mere change of municipal authority. It is true, no doubt, that these commissioners should be entitled to show any defense they might have to the judgments that could be pleaded to a *scire facias*, but because defenses may arise which might be available on a *scire facias* does not entitle a party to that writ. He may find it necessary to make the defense otherwise, for he is not entitled to a *scire facias* except when the conditions of the case require that writ to issue, according to the practice; but a suggestion, as shown by the practice books, is traversable, and if the facts upon which it is made be not true it cannot be entered of record. Moreover, owing to the peculiar nature of a mandamus, it affords in itself ample opportunity to these commissioners to make any defense by a return to the alternative writ or rule to show cause that they can make to the *scire facias.* The court will not issue the writ peremptorily if there be any reason sufficient in fact or in law against
86 it and the pleading is of that character which affords the widest scope for any defense available in any way. More entirely, therefore, here than in any other cases, as where the *fieri facias* or some like writ of execution issues, is the rule requiring a *scire facias* upon change of parties based upon the purely technical demand that the writ and the record shall consistently conform to each other. We do not find the precise point of practice determined, but we doubt if this reason of the rule requiring a *scire facias* or a suggestion of record for that purpose before a *fieri facias* can issue applies at all when the writ of execution takes the form of a mandamus, because of the essential difference in the forms of the two writs.

This is not, however, very important, as we hold that a bare suggestion, which may be now made of record, is all that is required. This suggestion need only state that by subsequent legislation the suable style of the defendant corporation has been changed from

that which appears in the face of the judgment to that required by the new legislation. If this be done the record is entirely consistent with any writ that may issue on the judgment, whether *fieri facias* or mandamus, and this is all that the practice seeks to accomplish in such cases. It is the same party, by a different name, sought to be charged, namely, the inhabitants of Brownsville in their corporate capacity; not any new party. Hence, no *scire facias* is necessary; and, since a mandamus may issue against individuals who may not be parties to the judgment, conformity to the judgment in names is not always either possible or necessary. Manifestly, we get those parties from the preliminary petition or affidavit upon which the mandamus is to be founded, and they may be the names of any persons whatever who are charged with the duty sought to be enforced. When they answer as individuals they can set up any defense, either in their own right or as the representatives of the defendant corporation,

Although there was a *scire facias* in O'Connor *v.* Memphis, *supra*, the court clearly recognizes that a suggestion on the record of the change of name may be the proper form of proceeding. 6 Lea. 731.

If Greeley *v.* Smith, 3 Story, 657; Mumma *v.* Potomac Co., 8 Pet., 281; The Sapphire, 11 Wall., 164, and Thompson *v.* U. S., 103 U. S., 480, have any application they support and do not conflict with the ruling we make.

Whether the inhabitants of the "city" of Brownsville, who in their corporate capacity contracted these debts, with a power conferred of paying them by local taxation, and whom the law still compels to pay them by the exercise of that power, were a different corporation from that same body of inhabitants who are now incorporated as the "taxing district" of Brownsville, or whether the old corporation be "dead" and a new one "arisen" as its "successor," or whether both be the same under different names, are questions pertaining more to the metaphysical doctrine of "psychopannuchism," if that can be adapted to corporations, which are said "to have no soul," than to the practical science of legal procedure.

The next defense set up is that one of the judgments is barred
87 by the statute of limitations, it having been more than 10 years from the date of the judgment to the suing out of this mandamus, although other like writs have issued in the meantime. If the time elapsed between the repeal of the charter and the reorganization into a "taxing district," during which there was no organization to be sued, be excluded, the 10 years have not expired and the bar has not attached. We have no hesitation in holding that it should be excluded, precisely as the time occupied by our late war was excluded, and for precisely the same reason. If a State, with the deliberate and confessed purpose of doing that, repeals the charter of a municipal corporation to enable it to evade or avoid the writ of mandamus to enforce judgments against it, thereby disable the plaintiff from proceeding in the case, the time of disability should not be computed in the period of the statute of limitations. We are aware of the stringency of the rule that courts will not ingraft upon the statute exceptions growing out of mere equitable con-

siderations of hardship or injustice, and the only doubt we have is whether the plaintiffs here are not put to a bill in equity to perpetually enjoin the defendant corporation from pleading the statute, as one might be for relief against any fraudulent contrivance of a defendant to arrest or delay the plaintiff's proceeding against him. But since the act of arrest complained of here is that of the State itself, by its own legislation and through its paramount authority, which none can resist, we find no difficulty in implying from the new legislation and governmental conduct of the State an intention to exclude the time of disability from the statute, as is done in case of war. Hanger *v.* Abbott, 6 Wall., 532; U. S. *v.* Wiley, 11 Wall. 508, 513, where it was ruled that, although the right to sue was unimpaired, the "loss of the ability to sue rather than the loss of the right, stops the running of the statute." And in Braun *v.* Sauerwein, 10 Wall., 218, where the limitation was suspended by the operation of an act of Congress, just as we think this legislation operates, Mr. Justice Strong remarks of the decisions:

"They all rest on the ground that the creditor has been disabled to sue, by a superior power, without any default of his own, and therefore that none of the reasons which induce the enactment of the statutes apply to his case; that, unless the statutes cease to run during the continuance of the supervening disability, he is deprived of a portion of the time within which the law contemplated he might sue."

There are other applications of the doctrine quite as familiar, as in cases of delay pending appeals. Montgomery *v.* Hernandez, 12 Wheat., 129, 134. Moreover, this proceeding by mandamus is, in its constituent elements and its frame-work, capable of supporting even an equitable defense against the statute. Ang. & A. Corp. (11th ed.), §§ 715, 721, 729; High, Extr. Rem. (2d ed.), §§ 14, 457, *et seq.* The court does not grant or refuse the writ upon purely legal considerations. If the defendant has any equitable defense against it, he may set it up in his answer to the rule to show cause or alternative writ, and it will authorize the court to refuse the peremptory writ.

88 So, if he sets up a legal defense and the plaintiff can show an equitable answer to it, we see no reason why the legal defense should prevail to obstruct the writ. Therefore we might issue this writ, notwithstanding the bar of the statute, if it be inequitable for the defendant to set it up; but by this we mean only such an equitable defense as would authorize a court of equity to relieve against the bar by its injunction, and not cases of mere hardship.

The next matter for consideration is the character of relief to be granted to the plaintiffs, and there are complications in the case which are perplexing, so much so that one of these petitions was originally filed as a bill in equity, but, under the orders of the court, was converted into an application for mandamus, for reasons that are obvious in the record. Under former writs, as to some of these judgments, taxes were levied, partly collected, and paid over. Some of these levies were commingled with other judgments from this

and the State courts, one rate being intended to cover all, and now we are asked to compel another levy for the unpaid balance.

We have repeatedly held in this court that where a levy has been made sufficiently large to cover the judgment with a reasonable allowance of margin for delinquencies, we would not compel a further levy for inadequacy until all the remedies afforded by law against delinquent tax-payers and their property had been exhausted. Otherwise the burden would be always placed wholly upon the prompt tax-payers, and levies out of all proportion to the needs of the case would be piled up to go into the general fund or be never collected. We adhere to this now, but the peculiarities of this case present, we think, an exception, unless the defendant shall, by its return to the writ, present facts that will bring the case within the ordinary ruling. It appears that there is no statutory receiver, as there was in the Memphis case, to collect the delinquent taxes of the "extinct" corporation, and it is stated that not even can the old tax-books be found, and the facts concerning the condition of the levies are not known. A receiver was authorized by the legislation, and one of the Governors of the State appointed one; but, yielding to the hostile pressure of public opinion and the difficulties of giving bond, he declined to qualify. Subsequent Governors have neglected or refused to appoint a receiver, and no provision has been made in the administration of affairs for the collection of those levies. Obviously we cannot compel the Governor to appoint a receiver—or we do not wish, at least, to attempt that—and this court long since intimated that it would not do so, as it would be nugatory, in all probability. High, Extr. Rem. (2d ed.), § 14. Nor could we compel a person to accept or qualify as receiver, if appointed. Therefore we think that for the purposes of this case the defendant corporation and the State itself may be held to have abandoned the levies heretofore made, and the creditors likewise; that it is thus demonstrated that the levies were inadequate to satisfy the judgments, and that the case stands as if it had been shown that the levies had been wholly exhausted, leaving a balance unpaid.

It is next insisted by the plaintiffs that since the Legislature, by the act of 1881, levied a tax of one dollar, enacted that one-
89 half of it be paid upon the old debts, and provided the machinery for its collection, we should now compel that tax to be collected for each year that has transpired since the act was passed. As to this, it is to be observed that the act was a general one, applying to all "taxing districts" of the second class, and Brownsville was not organized as a taxing district for nearly two years afterwards, that being the time we have already excluded from the computation on the statute of limitations. Therefore it can scarcely be said to have been, as to Brownsville, a subsisting levy while the municipality was disorganized and not rehabilitated under this act. If it came into force as a levy upon reorganization, that did not take place, we infer, until about the time the Legislature again met and changed the law, if it did not occur afterwards. The general act of 1883, already largely noticed, applied to all taxing districts and contained, as stated, a broad repeal that perhaps in

itself abrogated this former tax under the act of 1881; but the denizens of Brownsville did not seem to recognize this, for in 1885 another act, applicable to Brownsville, amended the act of 1881, repealed the former tax, and gave to the "taxing district" itself the largest powers of taxation for all purposes, even to pay "old debts," which evident blunder, however, was speedily corrected by the extra session act of the same year, and the special legislation relating to Brownsville was brought in harmony with the general scheme, already explained, whereby the municipalities were prohibited from exercising the taxing power except to pay the compromise bonds in default of levies by the Legislature, etc. Moreover, the general tax acts already referred to, providing a single assessment for all purposes and directing how county and municipal taxation should be accomplished when authorized, of themselves, by their repealing clauses, abrogate all the foregoing special methods for Brownsville.

Now, these revocations of the taxing power under the act of 1885 and the repeal of the Legislative levy under the act of 1881 are not, either of them, affected by the Federal Constitution, because, being subsequent to the contracts upon which these judgments were founded, they did not enter into and become a part of the remedy; wherefore they were within the control of the Legislature. So that, whether we consider the one or the other, they no longer exist as a basis for the coercive payment of these judgments through the operation of a mandamus.

But there is still another reason why we cannot proceed under the act of 1881. It may be doubtful, under the ruling of Lynn *v.* Polk, 8 Lea, 135, whether the Legislature can levy a continuing tax beyond the two years for which it is elected, and whether that is not the utmost limit of its authority under the State constitution; but we need now express no opinion on that point. It is well settled that, whatever be the power of a Legislature in that regard, such levies are not favored nor raised by implications and constructions of the statute. The intention to make a tax continuing or permanent must be clearly manifested by explicit enactment; otherwise the courts favor the principle of periodical levies, whereby the taxation is scrutinized in the constantly recurring assemblies of newly-elected representatives. U. S. *v.* Wigglesworth, 2 Story, 369;
90 Adams *v.* Bancroft, 3 Sum., 384; Wilkinson *v.* Greely, 1 Curt., 438; Cooley, Tax'n, 202; 1 Desty, Tax'n, 102, 138; 2 Desty, Tax'n, 1055; Burroughs, Tax'n, 194, 554.

There is no such explicit manifestation of an intention to levy a permanent tax of one dollar by the act of 1881 as is implied in the application to now enforce it against the taxing district of Brownsville, which was organized after the two years to which the levy would certainly apply.

The general result is that the plaintiffs are left to the same remedy that we applied in the Memphis case, and they can have a writ only to that extent, unless the defendants by their answer to the rule show some better defense than has been suggested by their demurrers to the petition. We need not say, of course, that we cannot enforce any judgments of the State courts, and that as to these the

petition will be denied. If the parties cannot agree as to any credits to be entered upon the judgments, that disagreement must be settled before the mandamus can issue, and, if desired, the clerk may, upon a reference, report the facts to the court and the balances due. Some of these defenses would, perhaps, be more appropriate in an answer to the rule to show cause; but on the demurrers to the petition, we take it, the defenses may be presented, and we have thought best to settle the case, so far as can be done, but without prejudice to the defendants to make any defense desired by response to the rule.

I am authorized to say that these were the conclusions reached by the court at the hearing, and that the circuit judge fully concurs in this opinion. Counsel will prepare the necessary orders. So ordered.

91 (Circuit Court, W. D. Tennessee.)

LOAGUE *v.* TAXING DISTRICT OF BROWNSVILLE.

Application for mandamus. July 28, 1888.

Mandamus to Municipal Boards—Judgment—Res Adjudicata.—No defense can be made to a writ of mandamus issued upon a judgment by default against a municipal corporation which might have been made to the original suit upon the coupons. Held, therefore, where bonds issued without legislative authority were invalid, that the defendant corporation was bound by a judgment by default upon the coupons, and could not set up as a defense to the mandamus that there was no act commanding the tax to be levied, this being the same defense as the other, when it depends upon the want of authority to issue the bonds, as in this case.

The intestate recovered judgment in this court against the defendant corporation by default. This is an application for a mandamus against the officials charged with the duty of levying taxes to enforce a sufficient levy to pay those judgments. To the writ return is made that there is no act of the Legislature commanding the levy; that the act of February 8, 1870, c. 55, authorizing the bonds upon coupons from which the judgments were rendered, was abrogated by the new constitution of Tennessee, going into effect May 5, 1870, and that by the same act so abrogated and not by any other act whatever were the defendants to this writ authorized to levy the taxes claimed by the writ. The plaintiff moved to quash this return upon the ground that it was not a sufficient defense, since by the judgments themselves the defense was precluded, as already adjudicated between the parties.

CRAFT & COOPER,
For Plaintiff.
SMITH & COLLIER AND
BOND & RUTLEDGE,
For Defendant.

HAMMOND, *J.* (after stating the facts as above): After the decision in Devereaux *v.* Brownsville, 29 Fed. Rep., 742, the alternative writ issued in this case, and the defendants make return that the act under which the bonds were issued was abrogated by the new constitution of this State of 1870, and this before the election was ordered or the bonds issued, whereby they are void, and that by his act only were they ever charged with any duty to levy taxes to pay said bonds. Thus the same questions are presented as in the other case of Norton *v.* Brownsville, *ante*, 99 (just determined by this court). It is not necessary to repeat the facts of that case, which was heard with this for convenience and both upon the same agreed state of facts filed in the record. We there held that the bonds were invalid, and directed a verdict and judgment for the defendant corporation, upon the ground that the new constitution, which went into effect before the bonds were issued, abrogated the act of the Legislature authorizing them. Norton *v.* Brownsville, *supra;* but in this case the plaintiff contends that this defense was settled against the defendant by the judgment by default; that these questions are in this case *res judicata*, and can be no longer open to the defendant.

92 To this answer is made that the individuals made defendants to this writ of mandamus are required to levy the tax demanded only by the statutes of the State of Tennessee imposing that duty upon them; that the object of this mandamus is to enforce the performance of that duty; that the judgment, whether by default or upon issue pleaded, adds nothing to the force of that duty nor to the effect of the statutes under which it is commanded; that, although their predecessors in municipal authority may have neglected to defend the case, the judgment is none the less a mere debt in another form, about which these defendants have no duty to perform unless the act of the Legislature authorizing the debt, whether it be in the form of bonds or of judgment, is a valid law binding on these defendants, and therefore they cannot be compelled to levy taxes to pay an invalid debt.

They further urge that the *fieri facias* is the execution writ for a judgment, and they admit that if such a writ should find property of defendant payment could be coerced and no defense like this could be set up to that writ; but the writ of mandamus is of a different nature, and, inherently, must be always open to the defense that there is no law requiring the alleged duty to be performed, and that no duty is in fact imposed; that each defendant may in turn make this defense, who is supposed to be charged with that duty; that to pay a judgment by paying taxes is not to pay it under a *fieri facias*, but independently of any judgment whatever; that the duty to levy or the writ which commands a levy issues, not out of the judgment like the *fieri facias*, but wholly aside from it as a new and independent proceeding, and therefore that the judgment concludes nothing as to that writ; that in Tennessee in the State courts, as elsewhere may be done, the mandamus may issue without any judgment at all, and the court may command the levy upon the bare application of the creditor, and this defense, being available in such a proceeding, must be just as available if the creditor be required to have a

judgment and *nulla bona* return of the *fieri facias* as a preliminary step to qualify him to make the application for a mandamus, and that these preliminary qualifications can give him no better standing with the judgment than without, so far as this defense to the mandamus is concerned; and this argument is supported by the suggestion of two acts of assembly—one authorizing the bonds and another authorizing a tax to be levied to pay them and imposing on defendants that duty—all under a state of administration that would devolve the duty of issuing the bonds on one official, and the duty of levying the tax on another, and the duty of defending the municipality, when sued upon the bonds, upon one official, and that of defending against a levy of taxes upon the application for the mandamus upon another. "Would a judgment by default upon the bonds under such circumstances conclude the taxing officials upon an application for the mandamus; and, if not, why should it, if both these duties be prescribed by one act of the Legislature, instead of two?"

This argument is very strongly maintained and seems plausible enough, but the court doubts its soundness, unless it goes to
93 the extent of abrogating the whole force of the judgment in such cases and reducing it to a mere calculation of the amount due, because if the defense is open on the mandamus proceedings to enforce the judgment it is always open until the money be paid, and perhaps even that would not preclude it if a judgment at law does not conclude the defenses that may be set up, and it surely comes to this, that while a judgment would bind all the property of the municipality and conclude every defense as to its execution in that direction, if the property is in the shape of tax funds to be levied and collected for its payment, the creditor must establish the validity of his bonds, not only in a suit at law against the municipality, but in innumerable other suits, as against any of its officials charged with the duty of levying the tax or collecting it, for these duties may be and generally are performed by different officials, any of whom may require a mandamus before discharging the duty, respectively. The municipality is an entire thing, and when it is sued properly it comes before the court as an entirety; and whoever may be charged with that duty must make its defenses like other defendants make them, once for all its agents and agencies, all of whom should be bound by a judgment against the municipality itself to the full extent that it has effect; otherwise a judgment against a municipality would not be very effective; and I do not well see why there should be in this regard any peculiar sacredness extending to tax funds and the process of reaching them in satisfaction of a judgment that does not attach to other property leviable upon *fieri facias*. It is quite true that the authorities speak of the mandamus as a new suit and as an independent proceeding, etc., and, technically, it does not issue upon the judgment as a matter of course as a *fi. fa.;* but even the *fi. fa.* is a judicial writ and originally required an order of court to authorize it, and only by legislation does it issue ministerially, so to speak, from the clerk without an order of court. That writ belongs to the judgment as

a kind of inherent and attendant incident of it undoubtedly, and a mandamus does not; but still the difference in this regard is exaggerated, it seems to me, when we are asked to hold that because of that difference the judgment debtor may go behind the judgment and reopen defenses which it is admitted are closed as against a *fieri facias*. The reason for the estoppel applies to one as well as to the other, and, independently of either, rests upon the sure foundation that one brought into a court to answer another must be concluded by the judgment as to all defenses that he made or should properly have made to the suit, or the judgment is a vain and useless thing; and whatever the law allows in the way of procedure after judgment to enforce it should be protected by this principle and is. A suit upon this judgment, for example, would be a new and independent suit in every sense that the proceeding by mandamus is new and independent, and, if need be, it could be said to be more independent indeed; and yet the defendant upon such a suit could not go behind this judgment and set up these defenses that were available when it had its first day in court. Hence, the newness or independency of the mandamus proceeding so much urged in argument should not affect the question of the estoppel, it seems to me.

94 It is declared in U. S. *v.* Macon Co., 99 U. S., 582, 591, that the judgment gives no additional right to a levy of taxes than the creditor had before, and the application of that principle is well illustrated by the facts of that case; nor here could the judgment creditor ask to enlarge his right to a levy because of the judgment. He does not do this. He only asks that the question of the validity of the legislation giving him the remedy by a levy for the payment of the bonds shall be concluded by a judgment upon the bonds, which establishes not only that they were valid obligations, but that the given remedy shall be allowed to him. How this might be if the remedial legislation were wholly separate and independent of the legislation authorizing the bonds we need not perhaps inquire, for here the remedy was given by the same act and became a part of the contract and a security for it. Any invalidity, therefore, that attached to the act as a whole should have been set up as a defense, it would seem to me; but I do not wish thus to evade the force of the argument and illustration, and place the ruling on the broader ground that when the municipality was sued upon the bonds it could not delay the defense against the levy of taxes to pay them upon any theory that it would be time enough to make that defense upon the application for mandamus. Under some facts and circumstances perhaps this might be done, but here the identical defense set up against the levy of taxes is that the act authorizing the bonds was abrogated or repealed before they were issued, and that therefore they were unauthorized. If the bonds are valid, the power to levy taxes is plain and the duty to do so established. The judgment conclusively declares the validity of the bonds, and that is the end of it. Neither the character of the legislation nor the facts of the case segregate the defense against a levy of taxes from that against the validity of the bonds; but, on the contrary,

both show that they are the same and indivisible, except upon the theory that the tax-levying agency of the municipality is not bound by a judgment against the municipality generally, but may, when called to discharge the duty, show that the judgment should not have been rendered upon the bonds because they were unauthorized by law, or, what is the same thing, so far as this case is concerned, that there is no law imposing the tax they are asked to levy. It is said that the duty to levy taxes is not established by law, to be sure, but this is said only because the bonds have been held in another suit to be invalid, and not for any other reason affecting distinctly and only the duty called in question. Defendants admit that if the bonds are valid the duty exists, and so the real distinction is that if the bonds may be valid and still the duty to levy taxes does not arise, then the defense against the levy might perhaps be made, notwithstanding a judgment; but that is clearly not this case. The defendants' counsel admits that the bonds have been adjudged to be valid by this judgment, but only for the purpose of one writ that may be used in execution, called a "*fieri facias*," while as to that called a "mandamus," which may likewise be so used, if the bonds be valid the adjudication is denied; but this is a limitation upon the principle that is as destructive of it as if it were wholly denied.

95 It is not conceived that the case of Boyd *v.* Alabama, 94 U. S., 645, affects this question. It is not pretended here that this adjudication by default as to the validity of these bonds precludes further inquiry as to the merits of the defense against them in other suits, even between the same parties, the authority of the legislative act alleged to have been abrogated not having been, in fact, called in question in this case and settled by the court. But it is this very judgment itself that we are asked now to enforce, and certainly that is binding on the parties until it is fully executed, if binding at all. Even the judgment we have just given in the first of these cases, Norton *v.* Brownsville, *supra*, upon other coupons does not proceed upon any theory of *res judicata* as between those parties by the former judgment of the circuit judge, which has been there mentioned. The court follows that judgment as a precedent and rules in the same way as formerly was ruled in another case, but it does not proceed on the ground that the question is closed as by an adjudication. There are cases holding that a judgment upon the same series of bonds or coupons is binding as upon the principle of *res judicata*, but it is not necessary here to go into the perplexities of that subject. The whole of it is that this return to the mandamus is really, though not confessedly, a collateral attack upon a judgment which has become conclusive by a failure to defend the suit originally or to reverse the judgment upon writ of error. The remedy against the neglect of those officials or agents who failed to do their duty in that regard is by a suit against them for their neglect.

Counsel say on both sides that they find no direct case, unless Harshman *v.* Knox Co., 122 U. S., 306; 7 Sup. C't Rep., 1132, be a case in point. The defendant distinguishes that case from this in its facts and the distinction is obvious. That was a neglect to traverse an

averment that might have been traversed, and it was held that the defense was no longer open. It also was a dispute about a fact as to whether the bonds were issued under one act of the Legislature or another. Here the entire absence of all legislative authority constitutes the defense, and we have held in other cases that it was a good one. Perhaps in this case the defense need not have been pleaded as a fact, since we take judicial notice of the constitution and statutes of a State and a demurrer to the declaration might have been as effective as any plea. But, after all, that is only a difference in the mode of bringing the evidence before the court of the fact that no legislative authority did exist. The suit and its pleadings averred the existence of that authority as a fact and the default admitted it in the face of a judicial knowledge that would have overthrown it, no doubt, if the averment had been challenged in any proper way; but, that not having been done, it passed into judgment that such legislative authority did exist, and that is conclusive. In principle Harshman *v.* Knox Co., *supra*, is, I think, identical with this case, notwithstanding the distinctions pointed out between the two cases.

The motion to quash the return of the defendant to the alternative writ of mandamus is granted, and the peremptory writ will issue.

Endorsed on cover: W. Tennessee C. C. U. S. No. 1445. The Commissioners of the Taxing District of the City of Brownsville, Tennessee, plaintiffs in error, *vs.* John Loague, administrator of R. D. Baker, deceased. Filed December 1, 1888.